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THE CORONATION CASES—II

SO far we have considered only those Coronation Cases within Group I of the classification given in the previous article.[1] It is now time to consider those falling within Group II. These were cases in which an action had been brought by one party claiming the return of money paid on the ground that, as performance by the other party had become impossible, there had been a total failure of consideration for the payment made. The principal case of the group is *Chandler* v. *Webster* (1904).[2] In that case the plaintiff had agreed to hire a room from the defendant for the sum of £141 in order to view the Coronation procession. He had paid £100 and was due to pay the balance when it was announced that the Coronation procession was cancelled. The plaintiff brought an action for moneys had and received claiming the return of the £100 on the ground that the consideration for the payment had wholly failed. The Court of Appeal (Collins, M.R., Romer and Mathew, L.JJ.) held that not only could the plaintiff not obtain a refund of the £100, but he was bound to pay the balance of £41.

In reaching this conclusion the Court followed the reasoning of two earlier Coronation Cases in which similar decisions had been given. In *Blakeley* v. *Muller & Co.*,[3] a Divisional Court consisting of Lord Alverstone, C.J., Wills and Channell, JJ., had

[1] (1941) 4 *Modern Law Review*, 241 at 245.
[2] [1904] 1 K.B. 493.
[3] [1903] 2 K.B. 760, n. See also *Krell* v. *Henry*, [1903] 2 K.B., 740, where, in view of *Blakeley* v. *Muller & Co.*, the hirer of the rooms abandoned a counterclaim for the return of a deposit.

held that a person who had paid for seats on a stand from which a view of the procession was to have been obtained could not recover his money when the procession was cancelled. This decision had been approved and its reasoning applied in *Civil Service Co-Op. Socy.* v. *General Steam Navigation Co.*,[4] where the Court of Appeal (Lord Halsbury, L.C., Lord Alverstone, C.J., and Cozens-Hardy, L.J.) held that £1,500 paid for the hire of a ship to see the Naval Review could not be recovered when the Review was cancelled.

These decisions established a rule of English law which is generally acknowledged to be unjust. Its abolition has been recommended by the Law Revision Committee,[5] but their Report has not yet been acted upon, and notwithstanding the labours of the Committee there is still room for an inquiry into the authority and scope of the rule.

That it was not beyond the power of the common law to deal with the situation when *Chandler* v. *Webster* came before the Courts is plain from the earlier case of *Knowles* v. *Bovill*.[6] In this case, which was mentioned in the previous article,[7] it was held that a person who had paid £150 for the use of a patent which the patentee was about to take out could recover the £150 in an action for moneys had and received when the patentee died before making the application for the patent. The Court of Exchequer (Martin, Bramwell, Pigott and Cleasby, BB.) held unanimously that the plaintiff could recover on the ground that the consideration had totally failed.[8] Bramwell, B., added, "Can anything be more obviously just and reasonable? Why should the contractor's death be a benefit to his estate, and inflict a loss on the other party?"[9]

It is noteworthy that this case was decided in 1870 and that both *Taylor* v. *Caldwell* and *Appleby* v. *Myers* (which will be mentioned shortly) were cited in argument. The Court of Exchequer found nothing in those cases to preclude recovery by the

[4] [1903] 2 K.B. 756. In this case, however, as in *Lumsden* v. *Barton & Co.* (1902), 19 T.L.R. 53, it is possible to contend that there was no total failure of consideration, for the defendants had sustained a detriment in partial performance of the contract; but the law relating to partial failure of consideration is in a state of obscurity. See Glanville Williams, "Partial Performance of Entire Contracts," to be published shortly in the *Law Quarterly Review*.

[5] Seventh Interim Report, Cmd. 6009 of 1939.

[6] (1870) 22 L.T. 70. Cp. *Scurfield* v. *Gowland* (1805), 6 East 241.

[7] (1941) 4 *Modern Law Review*, at 247.

[8] It may be mentioned that while this particular remedy is one belonging peculiarly to the common law, the underlying principle is the same as that on which recovery is based in the Civil law. Cp. *per* Lord President Inglis in *Watson* v. *Shankland* (1871), 10 M. 142 at 152. See also Law Revision Committee's Report (*cit. sup.*), Appendix A.

[9] 22 L.T., at 71.

plaintiff in the case then before the Court. Baron Martin stated the ground of recovery in the following words—

> "In cases of the total failure of consideration for a simple contract it (the law) implies a contract to repay the money which has been paid for the consideration that has so failed."[10]

It is submitted that this passage states the true basis of recovery in English law. A word of explanation must be said, however, with regard to one reference in it. Baron Martin mentions that the right to recover where there is a total failure of consideration is based on a contract *implied by law*. It is of the utmost importance that this reference should not be misunderstood. The obligation that is here referred to is not a contractual obligation. It is an obligation which is better understood if it is designated quasi-contractual. The notion of a contract implied by law is a legal fiction which was adopted when the action of *indebitatus assumpsit* (of which the action for moneys had and received is but one form) was first extended as a remedy in the case of quasi-contracts.[11] This particular fiction was adopted over a century and a half before *Taylor* v. *Caldwell* and has no connection with the fiction in that case. The mischief which is caused by retaining fictions long after they have served their original purpose is nowhere better illustrated than in the cases which we are here considering, in which the true principles underlying two fictions have become thoroughly misunderstood.

It may be mentioned that although *Knowles* v. *Bovill* was referred to in argument, all reference to this case was omitted from the judgments delivered in *Chandler* v. *Webster*. In the two earlier Coronation Cases of *Blakeley* v. *Muller & Co.* and *Civil Service Co-op. Socy.* v. *General Steam Navigation Co.* it appears that *Knowles* v. *Bovill* was not cited.

There were some other trends of authority before the Coronation Cases. In *Rugg* v. *Minett* (1809)[12] a quantity of turpentine, which had been sold, was destroyed by fire, without fault of the vendor, before delivery. The price had been paid. It was held that the vendor was bound to refund the price of all those lots in which the property had not passed; but was entitled to retain without deduction the price of those lots in which the property had passed, though they were not delivered. We shall return later to the survival of this rule in the law of sale of goods.

On the other hand a special rule had grown up for prepaid

[10] *Loc. cit.*
[11] See Winfield, *Province of the Law of Tort*, p. 125.
[12] 11 East 210.

freight which was out of harmony with the rest of the law relating to failure of consideration. Where freight is payable at the conclusion of a voyage and the vessel fails to complete the voyage owing to impossibility, the shipowner cannot claim the freight.[13] Yet the rule is that if the freight has been prepaid, no part of it can be recovered. This rule, which would cause hardship if it were not for the practice of insurance,[14] is out of harmony (it would seem, needlessly) with the rule of Continental law;[15] and in fact it obtained its direction from a decision of Lord Ellenborough's,[16] who is known to have had a "dislike of foreign laws."[17] His decision was consistently followed throughout the first three-quarters of the nineteenth century, at the end of which time the weight of authority had become too great for the law to be altered by judicial decision, although there has been a striking criticism of the rule by Lord Chief Justice Cockburn.[18]

Before the effect of this last rule upon the general law of quasi-contract can be assessed, two matters must be observed. (1) There is no need to extend the rule beyond the carriage of goods by sea. It is suggested in Scrutton on *Charterparties*[19] that the rule arose from the long voyages of the East India Trade, and it may fairly be regarded as exceptional. But even if it be thought to be applicable outside the law of carriage by sea, one other limiting factor must be noticed. This is that (2) the rule apparently does not apply if performance has never been commenced.[20] A similar distinction was drawn in a case at *nisi prius*[21] where passage-money[22] for a voyage from London to the West Indies was paid in London before the commencement of the voyage. The passenger put his luggage aboard in the Thames, meaning

[13] For a general discussion of this branch of the law see Williams, *op. cit. supra*, n. 4.

[14] For the practice of insurance see *per* Brett, J., in *Allison* v. *Bristol Marine Insurance Co.* (1876), L.R. 1 App. Cas. 209, at 223.

[15] "All the nations of the trading world, with the exception of England, concur in holding that an advance of freight by the charterers for ship's disbursements at the port of loading, in terms of an obligation to that effect in a charter-party, is, in the event of a loss of the ship and cargo, recoverable by the charterers from the owners, unless the parties contract expressly or by clear implication that it shall not be recoverable:" *per* Lord President Inglis in *Watson* v. *Shankland* (1871), 10 M. 142, at 151; *per* Cockburn, C.J., in *Byrne* v. *Schiller* (1871), L.R. 6 Ex. 319, at 326; *per* Lord Shaw in *Cantiare San Rocco* v. *Clyde Shipbuilding and Engineering Co.*, [1924] A.C. 226, at 257.

[16] *De Silvale* v. *Kendall* (1815), 4 M. & S. 37. But there was some previous authority: see Law Revision Committee's Report (*cit. sup.*), Appendix B.

[17] Campbell, *Lives of the Chief Justices*, Vol. 3, p. 236.

[18] *Byrne* v. *Schiller* (1871), L.R. 6 Ex. 319, at 326.

[19] 14th ed., p. 400, n. (*z*).

[20] Cp. *per* James, L.J., in *Ex p. Nyholm, Re Child* (1873), 29 L.T. 634, and Scrutton, *Charterparties*, 14th ed., p. 400.

[21] *Gillan* v. *Simpkin* (1815), 4. Camp. 241.

[22] On the question whether passage-money is freight see Abbott, *Merchant Ships*, 14th ed., pp. 662–3.

himself to embark at Portsmouth. The ship was lost in going round to Portsmouth. It was proved in evidence that in West India voyages the passage money was by custom paid before the voyage commenced, and that it apparently was not returned although the voyage was defeated. On this evidence, Gibbs, C.J., directed the jury (*a*) that if, with respect to this passenger, the voyage was to commence from London, the passage money could not be recovered. On the other hand (*b*) if the ship was lost before the commencement of the voyage for which these parties had contracted (i.e. if the voyage was to commence from Portsmouth), the money paid by anticipation must be returned. In other words, the stipulation for prepayment (implied by custom) is read as shifting the risk of the voyage provided that the voyage is commenced, but if the voyage is not commenced the ordinary rule as to total failure of consideration applies.

One other series of cases may be referred to here—those turning on articles of clerkship or indentures of apprenticeship. At one time there was abundance of authority for saying that where a premium was paid for such articles or indentures, and the master died[23] or became bankrupt[24] or misbehaved[25] within the term of the clerkship or apprenticeship, the Court of Chancery would decree the return of the premium or part of it.[26] These cases are still law in so far as there is a breach of contract by the master, as where he misbehaves; and the bankruptcy of the master is now regulated in the same way by statute.[27] But as regards the death of the master the law has changed. The present rule is that no part of the premium is returnable, for the reason that there is no breach of contract by the master and but a partial

[23] *Soam* v. *Bowden* (1678), Rep. t. Finch 396 (apprenticeship for seven years; master died after two years, having employed the apprentice only in some inferior affairs; whole of premium decreed to be returned); *Newton* v. *Rowse* (1687), 1 Vern. 460 (virtually a total failure of consideration owing to death of master; court decreed restitution of the whole fee notwithstanding an agreement providing only for the return of half); *Hirst* v. *Tolson* (1854), 2 Mac. & G. 134; *per* Romilly, M.R., in *Webb* v. *England* (1860), 29 Beav., at 55.

[24] *Ex p. Sandby* (1745), 1 Atk. 149.

[25] *Lockley* v. *Eldridge* (1674), Rep. t. Finch 124; *Therman* v. *Abell* (1688), 29 Beav. 55.

[26] *Aliter* if there is a termination by agreement (*Hale* v. *Webb* (1786), 2 Bro. C.C. 78) or by the apprentice running away (*Cuff* v. *Brown* (1818), 5 Price 297); but even here it was held that the Court—even the Court of King's Bench—might order a solicitor to return part of the premium, in virtue of its jurisdiction over its own officer: *Ex p. Prankerd* (1819), 3 B. & A. 257.

[27] Bankruptcy Act, 1914, s. 34: either the bankrupt or the apprentice (or clerk), may give notice in writing to the trustee electing to treat the indenture (or articles) as discharged by the bankruptcy, and such part of the premium as is reasonable in the circumstances is repayable to the apprentice as a preferential claim. Alternatively there may be a transfer of his indenture to some other person.

failure of consideration.[28] So also if it is the apprentice who dies.[29] The reason advanced, that there is but a partial failure of consideration, does not seem to be altogether consistent with the rule that a partial failure of an entire consideration is a total failure of consideration.[30] Perhaps the explanation is that this latter rule applies only where the discharge of an executory obligation is in question, and not where it is sought to recover money paid. But however this may be, the reason suffices to distinguish these cases from *Chandler* v. *Webster*, for in the latter case there was no question of part performance of the contract by the defendant. It is submitted that if in the apprenticeship cases there had been literally a total failure of consideration, as if the death had occurred before the term commenced, there could have been no argument against the right to recover. It is the same distinction as we found in the law of prepaid freight.

A similar question to that raised in the apprenticeship cases occurs where a partnership is prematurely dissolved and one partner seeks to recover the whole or part of a premium that he has paid for admission into the firm. In certain cases of this sort the Court has now a statutory power to order the return of the whole or part of the premium.[31]

Let us turn now to the reasoning upon which recovery was refused in the Coronation Cases. Three principal reasons were

[28] *Whincup* v. *Hughes* (1871), L.R. 6 C.P. 78; *Ferns* v. *Carr* (1885), 28 Ch. D. 409; *Learoyd* v. *Brook*, [1891] 1 Q.B. 431. In addition to the fact that the failure of consideration was only partial, three reasons were advanced for the decision in *Whincup* v. *Hughes*. (1) "The person receiving the premium naturally assumes that it becomes his property to be dealt with as he pleases" (Bovill, C.J.); he "had probably spent [the money] long before his death without ever contemplating the necessity of refunding it" (Willes, J.). To this three answers may be made. (*a*) In view of the decision in *Hirst* v. *Tolson* (*supra*) the master ought to have been aware of the possibility that he or his estate might be legally bound to restore part of the premium. (*b*) Even if there had been no previous decision on the point, the hardship to the defendant would only have been that which is incidental to all judicial law-making, which is always retrospective. (*c*) More specifically, the hardship to the defendant would only have been that which is possible in any case where money is decreed to be restored upon a failure of consideration (there might, for example, have been the same hardship in *Rowland* v. *Divall*, [1923] 2 K.B. 500). (2) As the parties had not expressly provided for the contingency of death, no contract for return of part of the premium could be implied (Montague Smith, L.J.). This argument again proves too much, for it would deny the action even in a case of total failure of consideration. Recovery in quasi-contract does not depend upon the intention of the parties. (3) It would be almost impossible to estimate the exact sum to be returned (Montague Smith, L.J.). Yet the Court does not feel this difficulty when assessing the amount due on a *quantum meruit* or *quantum valebant*.

[29] *Re Thompson* (1848), 1 Exch. 864. In Scotland an illogical distinction is drawn: see Gloag on *Contract*, 2nd ed., p. 58.

[30] See Williams, *op. cit. supra*, n. 4.

[31] Partnership Act, 1890, s. 40; see thereon Lindley, *Partnership*, 10th ed., pp. 684–90, and cases in *English and Empire Digest*, Vol. 36, pp. 508–11.

stated by Wills, J., in *Blakeley* v. *Muller & Co.*[32] and by Collins, M.R., in *Chandler* v. *Webster*.[33]

One reason given was the difficulty of constructing a hypothetical contract by supposing what the parties would have arrived at if they had contemplated the possibility of what was going to happen. This, be it observed, is not the "contract implied by law" which Baron Martin mentioned in *Knowles* v. *Bovill*. It is a suppositious extension of the principle of *Taylor* v. *Caldwell*,[34] by which a positive term allowing recovery was to be added to the negative term dissolving the contract, the whole to be imputed to the *intentions of the parties*. This highly artificial process was declared by Wills, J., to be "very unsatisfactory." There is not the slightest doubt of this, and if the only ground upon which recovery could be based was the fictitious implication of a term of this sort, this reason might well have been conclusive. But, with the greatest respect, we submit that such a process was wholly unnecessary. The supposition that recovery could be had only if such a hypothetical term could be constructed was based on the assumption that the principle involved was the principle of *Taylor* v. *Caldwell*. With great respect we submit that the principle of *Taylor* v. *Caldwell* had nothing to do with the matter of recovery, which should have rested on the ordinary principle of failure of consideration.

The second reason given was that recovery was precluded by the decision in *Appleby* v. *Myers* (1867).[35] But all that *Appleby* v. *Myers* decided was that on the facts of that case the plaintiffs, who were unable to complete a contract to erect machinery on the premises of the other contracting party, owing to an outbreak of fire on those premises, were not entitled to sue in respect of the part of the work that they had performed before the fire. The decision does not, as was supposed in the Coronation Cases,[36] rest on a "rights accrued" doctrine. It merely follows a line of authority to the effect that an entire contract cannot be apportioned, and that, generally speaking, there can be no recovery on a *quantum meruit* where an entire contract is not fully performed.[37]

[32] [1903] 2 K.B. 760 (n.).

[33] [1904] 1 K.B. at 499–501. One other reason for the refusal of recovery has recently been advanced, namely that it is merely an application of Serjeant Williams's first rule in the notes to *Pordage* v. *Cole*, 1 Wms. Saund. 319; see H. W. R. Wade in (1940) 56 L.Q.R. at 543–5. The fallacy involved in this suggestion has been considered elsewhere (Williams in McElroy, *Impossibility of Performance*, Chapter IV).

[34] (1863) 3 B. & S. 826.

[35] L.R. 2 C.P. 651.

[36] *Blakeley* v. *Muller*, the *Civil Service Co-op. Soc. Case*, and *Chandler* v. *Webster*.

[37] See Williams, *op. cit. supra*, n. 4, where the question is discussed whether the decision depends on the particular wording of the contract.

In the whole of the Court's judgment (delivered by Blackburn, J.) there are only two references to the principle of *Taylor* v. *Caldwell*, and both of them appear to have been misunderstood in the Coronation Cases. One of them runs as follows—

> "As it is, they [the plaintiffs] are, according to the principle laid down in *Taylor* v. *Caldwell*, excused from completing the work; but they are not *therefore* entitled to any compensation for what they have done, but which has, without any fault of the defendant, perished."[38]

The plaintiffs had contended that they were entitled to recover because they had not been guilty of any breach. All that the above sentence says is that the mere fact that under *Taylor* v. *Caldwell* they (the plaintiffs) were excused did not give them a right of action on a *quantum meruit*.

The other passage in *Appleby* v. *Myers* that was evidently misunderstood in the Coronation Cases is this—

> "We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither."[39]

In order to understand this sentence reference must be made to its context. Blackburn, J., is saying that just as (under the rule in *Taylor* v. *Caldwell*) the plaintiffs would not have been liable in damages for not completing the work, so (under the same rule) the defendants were not liable in damages for not continuing to provide the premises. "If, by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have had the option to sue the defendant for this default, or to treat the contract as rescinded, and sue on a *quantum meruit*." But as the defendants were not in default, the option to sue on a *quantum meruit* did not exist. This is a rule confined to the remedy of *quantum meruit*, and has nothing to do with the action to recover money paid on a consideration that has failed.

It may be added here that in *Krell* v. *Henry*,[40] Vaughan Williams, L.J., vouched another authority for the "rights accrued" theory, namely the case of *Stubbs* v. *Holywell Ry. Co.* (1867).[41] The error involved in this interpretation of *Stubbs's*

[38] At p. 660 (italics ours).
[39] At p. 659.
[40] [1903] 2 K.B. 740 at 754.
[41] L.R. 2 Ex. 311.

Case has already been exposed by Professor Buckland,[42] and need not be further considered.

The third reason was that the doctrine of failure of consideration did not apply because the contract was not avoided *ab initio*. If, however, the argument in the previous article is well founded, this is not the proper way to look at the matter. The true proposition is not that the doctrine of failure of consideration does not apply because the contract is not avoided *ab initio*; it is that the contract is avoided *ab initio* because the doctrine of failure of consideration applies. The plaintiff in *Chandler* v. *Webster* suffered a failure of the consideration for his promise, and that failure was enough to dispose of the binding force of his promise without any need for resort to a doctrine of implied condition. It is submitted that the only possible result of this way of looking at the matter is that the plaintiff's obligation became void *ab initio*.[43]

The present authority of the rule embodied in *Chandler* v. *Webster* may now be considered. Courts of first instance and the Court of Appeal have held themselves bound to follow the rule,[44] though its hardship has been acknowledged judicially on nearly every occasion when it has been applied.[45] As for the House of Lords, it has had two opportunities to consider the rule. The first was in the *French Marine Case* (1921),[46] a decision frequently forgotten in discussions of *Chandler* v. *Webster*. Here some noble and learned lords approved the rule, but whether as *ratio decidendi*

[42] (1933) 46 *Harvard Law Review*, at 1289, 1291.

[43] We are not here concerned with the question whether the failure of consideration operates automatically or simply gives an election to avoid. See on this question McElroy, *Impossibility of Performance*, pp. 96–8, 228–31.

A fourth reason for refusing recovery was given by Collins, M.R., in *Chandler* v. *Webster* (at p. 499). "The rule . . . is, I think, to some extent, an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which happened should be. Time has elapsed and the position of the parties may have more or less altered and it is impossible to adjust or ascertain the rights of the parties with exactitude." This reason drew from a distinguished Scottish judge a trenchant criticism of the rule itself: Lord Shaw in the *Cantiare San Rocco Case*, [1924] A.C. 226, at 258, 259–60.

[44] *Lloyd Royal Belge S.A.* v. *Stathatos* (1917), 34 T.L.R. 70; *Russkoe* v. *Stirk* (1922), 10 L.L.L.R. 214; *Graves* v. *Cohen* (1930), 46 T.L.R. 121 (where, notwithstanding the remarks of the learned judge, there was no impossibility in the payment of the money demanded by the plaintiff); *Fibrosa Soc. Anon.* v. *Fairbairn, etc., Ltd.*, [1941] 2 All E.R. 300.

On the other hand in *Anglo-Northern Trading Co., Ltd.* v. *Emlyn Jones*, [1917] 2 K.B. 78, affd. [1918] 1 K.B. 372, where frustration occurred in the middle of a time charterparty, Bailhache, J., and the C.A. upheld (without discussion of this particular question) an alternative award of an arbitrator whereby part of hire paid in advance before the frustration was declared to be repayable to the charterers.

[45] See, e.g., the observations of Atkin, J. (as he then was), in the *Lloyd Royal Belge Case*, 33 T.L.R. at 392, and of the same learned judge in the C.A. in *Russkoe* v. *Stirk* (above).

[46] *French Marine* v. *Compagnie Napolitaine*, [1921] 2 A.C. 494.

or as *obiter dictum* is not certain. The second was in the case of *Cantiare San Rocco* v. *Clyde Shipbuilding Co.* (1924),[47] where some of the speeches quite clearly disapproved it, but only by way of *obiter dictum*.

The important question is whether the approval given to the rule in the *French Marine Case* is so clearly part of the *ratio decidendi* that it would be binding upon the House in a future case in which the issue is raised afresh. In order to determine this question it will be necessary to discuss the case in some detail.

The short facts were as follows. A time charterparty provided, by Clause 5 thereof, for payment of a fixed hire per month and *pro rata* for any fractional part of a month until redelivery to the owners, payment to be made monthly in advance. The charterers were empowered to complete any voyage that was uncompleted at the expiry of the charter term. Provision was made for cesser of the hire in the event of a breakdown of machinery or of the steamer being lost or missing. At the end of the charter term the vessel was still on a voyage, so that in accordance with the charterparty the term was extended; and she was requisitioned by the Shipping Controller before the voyage was completed. The matter came before the Courts on a question from an umpire, namely whether at the end of the term originally fixed in the charterparty the charterers, not being then ready to redeliver the vessel, ought to have paid a further month's hire in advance. It was held without dissent on the construction of the charterparty that such hire ought to have been paid. Strictly speaking this should have been the end of the case, but the noble and learned lords went on to express opinions on the further question whether, if the month's hire had been paid, a proportionate part of it would have been returnable in respect of the part of the month that remained after the Government requisition—and consequently whether, the money not having been paid, the charterers were now liable to pay not the whole but simply the fractional part. On this it was held by a majority of the House (perhaps *obiter*) that the whole and not simply a fractional part was payable.

Lord Dunedin, who confessed to finding the question one of great difficulty, rested his opinion on the fact that, in his view, there was no redelivery within the meaning of the charter, and consequently that there was no contractual provision for cessation of hire. Hire admittedly ceased by operation of law, but this did not affect accrued rights. "The Coronation Cases here come to be in point."[48]

[47] [1924] A.C. 226.
[48] At p. 514.

Lord Sumner subjected the charterparty to a penetrating analysis, concluded that the event that had happened was not provided for in it, and thus again applied the Coronation Cases.[49] But in addition to relying on the authority of these cases, Lord Sumner made two points. First, in the instant case there was but a partial failure of consideration "for which in law no *pro rata* repayment could be claimed."[50] (It follows that the decision in the instant case can be upheld even though *Chandler* v. *Webster* be disapproved, for in *Chandler* v. *Webster* there was, it is submitted, a total failure of consideration.) Second, any quasi-contractual right of abatement *pro rata*[51] in the event that had happened was excluded by the construction of the charterparty. In coming to this conclusion Lord Sumner seems to have been moved by three considerations, but not one of them is very satisfactory. They were as follows. (*a*) The charterparty expressly provided for abatement *pro rata* in certain events (not this one) and *expressum facit cessare tacitum*.[52] It may be questioned, however, whether this maxim has weight where the event that has happened was unforeseen.[53] (*b*) Lord Sumner seems to have read the stipulation for prepayment as amounting in law to a partial shifting of the risk. "It is no doubt true," he said, "that the object of payment in advance is to secure the chartered owner in dealing with a foreigner, but that is no measure of the meaning of the stipulation which requires it."[54] With the greatest respect it is submitted that the "meaning" of such a stipulation is no more than that the money shall be paid in advance; there is nothing in it to vary the ordinary principle of quasi-contractual liability. (*c*) To give effect to the charterer's argument would mean that the owner would get no compensation for the loss of the advantage of having the vessel brought home.[55] But, with respect, there seems to be a lack of cogency about this argument also. The argument could perhaps be used to support the proposition that the obligation of the charterer ought not to be discharged by the requisition of the vessel. But granted that the obligation of the charterer is discharged by the requisition of the

[49] At p. 519.
[50] At pp. 517, 519–20.
[51] I.e., more exactly, a quasi-contractual right to recover money overpaid, which can be used as a partial set-off in an action by the chartered owners for the sum agreed to be prepaid.
[52] At p. 517.
[53] Cp. the words of Lord Sumner himself at p. 519: ". . . the obligatory directions of the Shipping Controller, for which unexpected event this pre-war form of charter made no provision." On the scope of the maxim see Beal, *Cardinal Rules of Legal Interpretation*, 3rd ed., pp. 84–5, and Maxwell, *Interpretation of Statutes*, 8th ed., p. 272.
[54] At p. 519.
[55] At p. 520.

vessel (which rule Lord Sumner accepted), the argument does not give a reason why the rights of the parties should be affected by the stipulation for payment in advance. Perhaps an illustration will make this clearer. Suppose that the Government requisition had occurred at the end of one of the months of the hiring (before the commencement of the next month), in such circumstances as to discharge the obligation of the charterer. In that case no further sum would have been payable by the charterer, and still the owner would have lost the advantage of having the vessel brought home. It may be reasonable in such a case to make the owner an allowance for the loss of this advantage, but the allowance should be made whether or not hire is paid or payable in advance; and in any case the matter is not an adequate reason for denying to the charterer altogether the ordinary remedies in quasi-contract.

The speech of Lord Parmoor followed similar lines to that of Lord Dunedin, holding that the charterparty did not cover the contingency and that *Chandler* v. *Webster* applied.[56]

Turning to the views of the dissentients, Viscount Finlay was of opinion that the charterparty by the general wording of Clause 5 provided for *pro rata* abatement even in the event that had happened. He did not express disapproval of *Chandler* v. *Webster*, but distinguished it on the ground that in it there was no contractual provision for return.[57] Lord Wrenbury took the more interesting view that hire is, *prima facie*, a payment made for user,[58] and that there was nothing in the charterparty to displace this presumption. He added that as the charterparty contemplated the payment of fractional sums for periods less than a month, there was nothing to prevent the House from giving effect to the partial failure of consideration.

It is perhaps the merest technicality to say of all these carefully-considered opinions that they were *obiter dicta*, for the reason that they went beyond the limits of the question addressed to the Court by the umpire. At the same time this fact does perhaps give the House some opportunity to review the matter if the question should again come before it, and in the *Cantiare San Rocco Case* (which was an appeal from the Scottish Court of Session) the noble and learned lords who then composed the House certainly seemed to consider themselves free to do so. Lord Birkenhead said: "The question is as to the law of Scotland,

[56] At p. 523.
[57] At p. 510.
[58] This view, although, seemingly, well in accord with principle, was rejected both by Lord Dunedin (at p. 514) and by Lord Sumner (at p. 521). See generally Williams in McElroy, *op. cit.*, pp. 102–7.

and I desire to say nothing which may in any way fetter opinion if those [the English] authorities hereafter come to be reviewed by this House, for none of them is binding upon your Lordships."[59] Among the English authorities cited to the House had been Lord Parmoor's statement of the rule in *Chandler* v. *Webster* in the *French Marine Case*. Of this statement Viscount Finlay said in the instant case that it formed no part of the judgment of the Lords,[60] but he did not explain why not, nor did he refer to the other approvals of the principle of *Chandler* v. *Webster* that were voiced in the *French Marine Case*. It seems that by the date of the *Cantiare San Rocco Case*, Viscount Finlay was ready to challenge the decision in *Chandler* v. *Webster*, for after referring to it and the other Coronation Cases he remarked that "questions have been raised as to some of these cases into which it would be out of place at present to enter." Lord Shaw was bolder, and denounced the English rule ("the 'something for nothing' doctrine") in no uncertain language. He also quoted a remark of Pollock[61] expressing the opinion that the House of Lords could reverse it.[62]

To sum up the argument so far, it is submitted that *Chandler* v. *Webster* was wrongly decided because there was in that case a total failure of consideration, and that the House of Lords, if it feels sufficiently strongly about the matter, still has the power to overrule it. But even if the authority of the case must now be accepted, there remain six cases in which money paid in advance can still be recovered on a total failure of consideration. These are as follows—

I. Where there is no Stipulation for Payment in Advance

In *Chandler* v. *Webster* there was an express stipulation for payment in advance, and so long as the decision stands we must, presumably, assume that such a stipulation is evidence of an intention to shift the risk of impossibility of performance—however unreasonable this interpretation may seem. The necessary result of the rule is the "rights accrued" doctrine, whereby if there is an agreement for prepayment and the money is not actually paid,

[59] At p. 233.
[60] At p. 241.
[61] *Contract*, 8th ed. (1911), p. 440. This remark was, of course, written before the decision in the *French Marine Case*.
[62] But it may be added that in the *Constantine Line Case*, [1941] 2 All E.R. at 187, Lord Wright in a very casual *obiter dictum* approved the "accrued rights" rule.

it can be recovered from the party in default even after the impossibility occurs.[63] This was in fact the decision in *Chandler* v. *Webster*.

But if money is paid in advance simply fortuitously, because it has to be paid at some time, it is submitted that it should be recoverable on a failure of consideration. There is not a single reason for denying recovery, and the case is not covered by the authority of *Chandler* v. *Webster*.

II. Where Goods that are the Subject of a Contract of Sale Perish before the Risk Passes

The rule in *Rugg* v. *Minett*,[64] whereby if goods agreed to be sold are destroyed before the risk[65] passes, money paid in advance must be refunded, is still the law. The wide scope of this rule should be noticed. (*a*) It applies even though the goods at the time of the contract of sale were "specific" within s. 7 of the Sale of Goods Act,[66] so that the seller was not liable for the non-delivery. Moreover, (*b*) the rule applies even though there was an express stipulation for payment in advance. In both *Rugg* v. *Minett* and *Logan* v. *Le Mesurier*[67] (which followed it) there was such an express stipulation, and yet the money paid was held to be returnable. Thus in this case the stipulation is not treated as evidence of an intention to shift the risk, and it is submitted that this is right. Finally, (*c*) there is no reason why the rule should be confined to physical destruction of the goods. In *Logan's Case* it was applied to a case where a raft of timber was lost by being broken up in a violent storm, and it should apply equally to a case where goods constructively perish by being requisitioned for Government purposes,[68] or to a case where goods fail to come into existence.[69] The wording of s. 20 of the Sale of Goods Act, which

[63] Professor Buckland in (1933) 46 *Harvard Law Review* at 1295 criticises the logic of the rule as usually stated. "The two propositions, that further performance cannot be claimed and that rights which have already accrued will not be disturbed, appear to be in fact inconsistent. If payment of the money is not further performance, it can hardly be performance at all, for it certainly is not performance already made." This is, of course, true, but what is meant by the statement of the rule is that further performance cannot be claimed except to the extent that money stipulated for prepayment has not been paid. A party who is in default under the contract cannot be allowed to gain an advantage through that default.

[64] *Supra*. p. 3.

[65] The risk of destruction by inevitable accident passes with the property, unless there is a contrary intention: S.G.A., s. 20.

[66] For the relation between this section and s. 20 see Williams in McElroy, *op. cit.*, p. 27.

[67] (1847) 6 Moo. P.C. 116.

[68] As in *Re Shipton, Anderson & Co. and Harrison Bros.*, [1915] 3 K.B. 676.

[69] As in *Howell* v. *Coupland* (1874), L.R. 9 Q.B. 462.

provides for the passing of the risk, is perfectly general, and is not confined to the risk of the physical destruction of the goods.

III. Where the Contract Subsequently Becomes Illegal

The general rule where a contract is illegal is that money paid under it cannot be recovered. But to this there are several exceptions, among them the rule that money may be recovered by one not *in pari delicto*, and also the rule in *Taylor* v. *Bowers*[70] whereby money may be recovered "if repentance takes place before the time for performance of the illegal purpose."[71] The latter exception would no doubt be liberally interpreted where the illegality is subsequent to the contract. In such a case if the party disaffirms when the contract becomes illegal he ought to be able to recover his money.[72]

How finely divided this may be from a case like *Chandler* v. *Webster* may be shown by a hypothetical illustration, for which we are indebted to an anonymous examiner for the Cambridge Law Tripos. *A* hires a room from *B* to view a procession in the City of London, and makes a payment in advance. After the contract is made the Common Council of the City, by virtue of statutory powers, forbids the letting of rooms for any other purpose than continuous habitation. From one point of view this is a constructive perishing of the room within the principle of *Taylor* v. *Caldwell*, and if this were all *A* would be unable (assuming that *Chandler* v. *Webster* is right) to recover his money. But from another point of view the action of the Common Council results in subsequent illegality of the contract; and it is submitted that as the law concerning illegality prevails over the law concerning impossibility,[73] *A* is entitled to recover.

So far we have spoken of cases where the act contracted to be done (which subsequently becomes illegal) has not been performed at all. But suppose that at the time when the contract becomes illegal it has already been partly executed: will this fact prevent recovery of money paid? Perhaps as the law now stands it will, but this is not (it is submitted) because of the rule in *Chandler* v. *Webster* (for there is no need to apply that rule to cases of subsequent illegality) but because the failure of consideration is

[70] (1876), 1 Q.B.D. 291.

[71] *Per* MacKinnon, L.J., in *Harry Parker, Ltd.* v. *Mason*, [1940] 2 K.B. 590. See also Keener, *Quasi-Contracts* (1893), p. 258 *et seq.*; Woodward, *Quasi-Contracts* (1913), p. 226 *et seq.*

[72] Cp. *Winnington* v. *Briscoe* (1722), 8 Mod. 51.

[73] For the differences between illegality and impossibility see Williams in McElroy, *op. cit.*, p. xxx.

only partial. This, however, has not been the approach adopted by the Courts, which tend to confuse the results of illegality with the results of impossibility.[74] Thus in the *Cantiare San Rocco Case*[75] the House of Lords assumed that the abrogation of an existing partly-executed contract by the outbreak of war (the parties being divided by the line of war) involved the application in English law of *Chandler* v. *Webster*. In the same way, in the recent case of *Fibrosa Société Anonyme* v. *Fairbairn, etc., Ltd.* (1941),[76] the Court of Appeal held that a contract for the sale of goods c.i.f. Gdynia was "frustrated" by Gdynia becoming occupied by German forces, and accordingly that on the authority of *Chandler* v. *Webster* a sum of money paid in advance was not recoverable. With deference it is suggested that although the dicta in the one case and the decision in the other that the money paid was not recoverable are perhaps correct as a matter of English law, the true reason would be that the failure of consideration was in each case only partial. In a case where the subsequent illegality results in a *total* failure of consideration, *Chandler* v. *Webster* need not be a bar to recovery.

Another difficult question occurs with regard to foreign illegality. The usual view, based on Dicey's opinion[77] and the decision in *Ralli* v. *Compañia Naviera Sota y Aznar* (1920),[78] is that a contract is illegal by English law if it is illegal by the *lex loci solutionis*. This view is, however, challenged by Dr. F. A. Mann,[79] who contends that the true rule is not one of English private international law (is not, in other words, a rule that illegality by the law of the country of performance is the same as illegality by English law), but is a rule, or rather two rules, of the English law of contract. These two rules are as follows. (*a*) Where the proper law of the contract is English, English law will regard illegality by the *lex loci solutionis* as a kind of impossibility in fact that discharges the contract.[80] This is an exception to the general rule in *Paradine* v. *Jane*.[81] (*b*) As a matter of public policy, English law may refuse to enforce a contract if the real object and intention of the parties is to break the law of a foreign country,

[74] A recent illustration is Lord Wright's inclusion among cases of "frustration" of contracts that become illegal through the outbreak of war: *Constantine Line* v. *Imperial Smelting Corp.*, [1941] 2 All E.R. 165 at 185; cp. Viscount Maugham at 177.

[75] [1924] A.C. 226.

[76] [1941] 2 All E.R. 300.

[77] *Conflict of Laws*, 2nd ed. at p. 553 (now 5th ed. at p. 657).

[78] [1920] 2 K.B. 287.

[79] (1937), 18 *British Year Book of International Law* 97 at 107 *et seq.*

[80] Cp. the American *Restatement of the Law of Contracts*, §§458, 461, which also treats foreign illegality as impossibility in fact.

[81] Aleyn 26.

and this even though the parties have expressly agreed to go on with the contract notwithstanding the foreign illegality,[82] and even though the proper law of the contract is not English. Assuming that Dr. Mann's argument is correct, a difficult question may arise if it is sought to recover money paid in advance under a contract that has subsequently become illegal by the *lex loci solutionis*. It may be that by English law the rule in *Chandler* v. *Webster* will apply, unless the contract is illegal under rule (*b*), in which case *Taylor* v. *Bowers* may apply. But this assumes that English law regulates the question of repayment, which will not necessarily be so if the case involves a foreign element. This brings us to the fourth exception to the rule in *Chandler* v. *Webster*.

IV. Where by the Rules of Conflict of Laws the Law Regulating the Question of Repayment is some System other than English Law, and that System Allows Recovery

The question which system of law regulates the matter of unjustifiable enrichment receives scant treatment in the English authorities, but it has been fully considered in a learned article,[83] where the view is advanced (after a full consideration of the various possibilities) that it ought to depend on the law of the place in which the payment of money or the vesting of property occurs which constitutes the enrichment. This, too, is the rule adopted in the American *Restatement*.[84]

V. Where there is Agreement to such Effect

The decision in *Lloyd Royal Belge S.A.* v. *Stathatos* (1917)[85] is particularly remarkable in that the Court of Appeal seems to have assumed that the result reached in *Chandler* v. *Webster* could not be reversed by contrary agreement, for the reason that the whole contract being avoided by excusable impossibility of performance or frustration, a clause providing for repayment of deposit fell with it. The flaw in this reasoning is that the entire law of impossibility of performance (as distinct from the law of subsequent illegality) is subject to contrary agreement by the parties, and it should be obvious that the parties may, by apt words, express an agreement that one clause only (or certain

[82] Cp. *per* du Parcq, L.J., in *Kleinwort, Sons & Co.* v. *Ungarische, etc., Actiengesellschaft*, [1939] 3 All E.R. 38 at 45.

[83] Gutteridge and Lipstein, "Conflict of Law in Matters of Unjustifiable Enrichment" (1939), 7 *Cambridge Law Journal* 80.

[84] *Restatement of the Conflict of Laws*, §§452, 453.

[85] 34 T.L.R. 70.

clauses only) of their contract shall be saved in the event of impossibility of performance, e.g. a clause providing for repayment. This common-sense view is supported by two decisions of the House of Lords,[86] and it is submitted that anything to the contrary in the *Lloyd Royal Belge Case* cannot be supported.

Illegality, however, is exceptional; where a contract becomes subsequently illegal a clause providing for the repayment of deposit in the event of such illegality will probably fall with the rest of the contract. This is not to say that the money may not be recovered under some rule of law independently of the contract.

VI. Where Legislation so Provides

Apart from the Bankruptcy Act and the Partnership Act (already noticed[87]) the only legislation affecting our topic at the present moment seems to be that arising out of the present war. By the Limitation of Supplies (Miscellaneous) Order, S.R. & O. 1940, No. 874, paragraph 4, an exception is established both to the principle of sanctity of contract and to the rule in *Chandler* v. *Webster*. The Order applies only to contracts to supply controlled goods made before 6th June, 1940.

We may add that with regard to the Apportionment Act, 1870, it has been held that this Act does not apply to allow recovery of part of the rent, etc., that has been paid in advance, on the ground that the Apportionment Act was an Act passed for the benefit of landlords: *Ellis* v. *Rowbotham*.[88] There are no clear words in the statute to necessitate this construction, and in *Ellis* v. *Rowbotham* the lease had been determined owing to the tenant's breach of contract. If a lease comes to an end without any breach of contract on the part of the tenant, it is difficult to see why the Court should go out of its way to limit the words of the Act. If there were no other authority, therefore, it might still be arguable that where a lease comes to an end without any breach of contract on the part of the tenant, the Court ought not to go out of its way to limit the words of the Act. Unfortunately the door is closed to this argument by the recent decision in *Hildebrand* v. *Lewis* (1941).[89] In this case the Court of Appeal, without considering the merits of the decision in *Ellis* v. *Rowbotham*, followed it and applied it where a lease came to an end

[86] *Elliott* v. *Crutchley*, [1906] A.C. 7, affg. [1904] 1 K.B. 565; *French Marine* v. *Compagnie Napolitaine*, [1921] 2 A.C. 494, particularly at pp. 512, 521, 524–5; see also *Derby* v. *Humber* (1867), L.R. 2 C.P. 247 (provision for return of part of apprenticeship premium).

[87] *Ante*, notes 27, 31.

[88] [1900] 1 Q.B. 740; cp. 16 T.L.R. 258 at 259 (*per* A. L. Smith, L.J., during argument). See also Foa, *Landlord and Tenant*, 6th ed., pp. 132–5.

[89] [1941] 2 All E.R. 584.

by service of a notice of disclaimer under section 8 of the Landlord and Tenant (War Damage) Act, 1939, with the consequence that rent payable in advance remained payable in its entirety notwithstanding the partial failure of consideration. On the other hand it had previously been held in *Turner* v. *Stella Bond, Ltd.* (1941)[90] that where the landlord serves a valid notice to avoid the disclaimer it follows from the express wording of section 11 of the Act that no rent is payable in respect of the period between the date of the service of a notice of disclaimer and the date on which the premises are rendered fit for occupation, even though the rent is payable in advance, and that, consequently, there must be apportionment.

Turning now to the Report of the Law Revision Committee, the Committee recommends that where a contract is discharged by frustration (this term evidently including what in this paper has been called failure of consideration), and money has already been paid under it, the payer shall be entitled to repayment of the sum less the amount of any loss directly incurred by the payee for the purpose of performing the contract. It is proposed in another paper[91] to question the policy underlying this permission given to the payee to deduct the amount of his loss; but for the purpose of the present paper it will be assumed that the recommendation passes into law as it stands. The question then is: Will the provision for the deduction of loss on repaying the money apply where the case falls within one of the exceptions to the rule in *Chandler* v. *Webster* that have already been considered? In order to answer this question let us look at each of the exceptions again.

The first exception, where there is no stipulation for payment in advance, does not seem to have been thought of by the Committee. It is submitted that the accident of payment in advance (e.g. where it is made merely as a matter of convenience) should not affect the final rights of the parties, and thus that the payee should have no right to deduct any sum that he could not recover by action from the other party.

It may be mentioned here that the Committee also appears to have overlooked the opposite type of case, where there is a stipulation for payment in advance and it appears that the stipulation was inserted by agreement in order to shift the risk of impossibility or frustration, to the extent of the payment. Here it is submitted that the proposed Act should not apply at all to the payment. But, of course, a mere stipulation for

[90] [1941] 1 All E.R. 449.
[91] Williams, *op. cit. supra*, note 4.

payment in advance should not be regarded as in itself evidence of an intention to shift the risk.

The necessity for bowing to the intention of the parties puts a difficulty (which is recognised by the Committee) in the way of changing the rule relating to advance freight. The Committee, while recognising that this rule is "unsatisfactory in principle," refrains from recommending any change in it[92] for the reason that "the business practice of shipowners and insurers is to some extent based on it." The difficulty may perhaps be shown in the following way. Suppose that no exception is made in the proposed Act for advance freight, and that soon after the passing of the Act a charterparty is made in which freight is paid in advance and insured, according to the previous custom, by the charterer. In such a case there will be pretty strong evidence of an intention to shift the risk to the charterer in respect of the payment in advance, and this intention ought to exclude the operation of the Act. Therefore, in order to prevent uncertainty, it is perhaps desirable to make an express exclusion from the Act of the rule relating to advance freight. At the same time one cannot help regretting the necessity of thus perpetuating a rule that is admitted to be unsatisfactory in principle and that causes an inconvenient divergence between English and Continental law.

Passing to the second exception, that in the law of sale of goods, here again the Report does not say whether the present rule is to be superseded by a rule allowing the deduction of a sum representing the detriment to the payee. It is respectfully suggested that the matter should be expressly dealt with in the Act, if the legislation goes through in its present form. As to the third exception, illegality, it is difficult to suppose that a payee could indemnify himself against loss incurred in preparing for or performing an illegal contract, particularly where his part in the wrongdoing is greater than the payer's; but allowance should be made for performance done while the contract is still lawful. As to the fifth exception, it will no doubt be provided that the retention of a sum in respect of loss is subject to any expressed contrary intention of the parties. The fourth and sixth exceptions need not be specially provided for.

R. G. McElroy.
Glanville Williams.[93]

[92] Except as regards hire paid in advance under a time charterparty, in which case the practice is different.

[93] The original draft of this article was written by the first author, and his work is substantially embodied in pp. 1–4, 7, 9, above. The rest of the article is substantially the responsibility of the second author.

THE DEVELOPMENT OF BLACKMAIL

IN the discussions, judicial and academic, of the offence which has come to be called blackmail the draftsmen of the provisions now contained in the Larceny Act, 1916, have met with some criticism. It has often been pointed out how difficult it is to analyse the wording of sections* 29 (1) (i) and 30, concerned respectively with a written demand with menaces without reasonable or probable cause and with a demand with menaces with intent to steal, and to explain the relation between them. It is sometimes assumed that the blackmailer cannot be brought to justice unless he offends against one of the two sections which are found so puzzling. But the neglected section 31 seems to be expressly aimed at the offence, for every blackmailer who threatens to expose his victim is a person who, with intent to extort a valuable thing or to procure an appointment or office of profit, threatens to publish a libel or to print or publish any matter or thing touching another person. It was not necessary for judicial decisions to explain that the second part of the section is not confined to libellous matter[1] or to printed matter.[2] As the Larceny Act is now usually understood, section 31 covers conduct far more frequently punished under the two preceeding sections. Any criticism of the draftsmanship of the Act for this apparent duplication of offences ought to be supported by an examination of the legislative history of blackmail, for the Act of 1916 is no more than a consolidating statute as also was the Larceny Act of 1861 from which sections 29 and 30 are immediately derived. Section 31, however, originates in section 3 of the Libel Act, 1843, which was not repeating any earlier provision and which was not incorporated in the Larceny Act of 1861. The neglect of this offence of extortion may be accounted for by its absence from the earlier consolidating measure by the side of the other offences relating to unlawful demands. It is hoped to show that blackmail in its less gross forms was first made punishable by the Act of 1843 and that in those forms which require the presence of "menaces" there had to be, originally, and until fairly recently, something like a threat of personal violence or of violence to property.

A mere perusal of the Larceny Act, 1916, as it stands leads to doubts whether at some time or other there may not have been a serious misunderstanding of the scope of the offences which had previously been consolidated in 1861. Under section

* The relevant sections of the Larceny Act, 1916, are printed below, pp. 49-50.

[1] *R* v. *Coghlan* (1865), 4 F. & F. 316.

[2] *R* v. *Wyatt*, 16 Cr. App. R. 57; 91 L.J.K.B. 402.

29 (1), parts (ii) and (iii), it is a crime to accuse or threaten to accuse, in writing or otherwise, of certain serious offences specified in sub-section (3). The maximum punishment for this crime is penal servitude for life, as it is under part (i) of the same sub-section. Yet would not a written demand for property by means of a threat to accuse of a crime not included in sub-section (3) be treated at the present day as demanding with menaces without reasonable or probable cause? The crime of obtaining by false pretences is not within sub-section (3), for example, as it is punishable with five years' and not seven years' penal servitude, nor is the offence under section 11 of the Criminal Law Amendment Act, 1885, as it is not one of the sexual offences specified in the same sub-section,[3] yet a written demand for property by means of a threat to accuse of these crimes would, it is believed, be usually taken to be a form of blackmail against which section 29 (1) (i) is directed. Why, then, should the legislature have taken the trouble to deal separately with blackmail by accusations of the more severely punished crimes? The mental element in part (i) differs from that in parts (ii) and (iii) which, like section 31, speak of an "intent to extort." "Menaces" are required by part (i), as they are by section 30, which fact suggests that section 30, by covering oral blackmail with menaces, supplements section 29 (1) (i) which deals with written blackmail with menaces: the written and oral form of blackmail by accusation of the more serious crimes are both included in sub-section (1) of the same section in parts (ii) and (iii) respectively. Does, therefore, the word "menaces" introduce a further and graver element into the offence, leaving blackmail by threats of less serious action and by less serious accusation to be punished under section 31? The "menaces" element has in recent years been the subject of little discussion which has been attracted mainly by "reasonable or probable cause" and "intent to steal,"[4] yet "menaces" makes an earlier appearance on the statute book than "reasonable or probable cause." The fact that the person who demands "with menaces or by force" is within section 30 might alone suggest that "menaces" in both this section and section 29 imports a threat of something like personal force as distinct from the use of actual force: if this be so there is no redundancy in breaking-up section 29 (1) into three parts. A consideration of sub-section (2) of section 29 gives further reason for thinking that this suggestion may be sound. Sub-section (2) is professedly only concerned

[3] *R* v. *Gilgannon*, 63 J.P.Jo. 457.

[4] In his article, "The Anomalies of Blackmail" (55 L.Q.R. 382–399), Prof. A. H. Campbell's analyses and speculations are almost entirely confined to other elements than "menaces."

with threats of serious crime and with personal violence or restraint. It deals not with the person who demands property or any valuable thing but with him who compels another to execute any valuable security, etc., "(*a*) by any unlawful violence to or restraint of the person of another, or (*b*) by accusing or threatening to accuse any person (whether living or dead) of any such crime" to which the section as a whole applies "or of any felony." The limitation of sub-section (2) to these two cases prompts the thought that a written or oral demand for the direct handing over of property might likewise be limited to the two cases of threats of violence and of accusation of crime; the second case is expressly dealt with in sub-section (1): is the first intended to be provided for by the word "menaces"?

There is, on the other hand, another consideration which strikes one on reading the Larceny Act and which might appear to indicate that the above doubts are unsubstantial. The blackmailer who is charged under section 31 is guilty only of a misdemeanour punishable with two years' imprisonment.[5] We are used to very severe sentences being meted out to blackmailers and it does not seem to occasion surprise that a threat, for example,[6] "to let the town know all about your going on" with a woman can, as the law is now understood, be visited with a sentence of penal servitude for life and a private whipping in addition to any other punishment, if the miscreant be a male under the age of sixteen. But it may have shocked the lawyers of the eighteenth century, for whom this milder kind of blackmail was not criminal, that such conduct could be punished with the severity more appropriate for the highwayman and the arsonist. It may be noted when in 1757[7] the sending of a letter threatening to accuse of the more serious crimes "with a view or intent to extort or gain" was made an offence it was only a misdemeanour punishable with seven years' transportation, not a severe sentence according to the standards of the time. It is now a felony punishable with the severest sentence known to the law, short of death.

Although the term blackmail is in general use among lawyers as well as others it is barely a century old in its modern sense and has not become a word of art. Extortion, an ancient term familiar to the Common law, is better fitted to describe those

[5] And unlike a person found committing any other offence under the Larceny Act he cannot be immediately arrested without warrant by a private person: s. 41 (1).

[6] *R* v. *Dymond*, 1920, 2 K.B. 260.

[7] 30 G. 2 c. 24, s. 1. Re-enacted 4 G. 4 c. 54, s. 3, 7 & 8 G. 4 c. 29, s. 8, Larceny Act, 1861, s. 46, Larceny Act, 1916, s. 29 (1) (ii). S. 29 (1) (iii) has a similar history, beginning with 4 G. 4 c. 54, s. 5.

offences based on an intent to extort which are a statutory enlargement of the crime of extortion at Common law. But when the word blackmail came to be used in a wider sense than that it originally bore it was employed to satisfy a terminological need caused by the general practice of the Larceny Acts to define the conditions of criminality not by an abstract noun, such as larceny, embezzlement, or extortion, but by describing the conduct of the criminal: "a person steals who," "every person who," are characteristic beginnings of sections. There is no obvious single word to apply to sections 29 and 30. Blackmail was originally the tribute exacted by free-booters in the northern border counties to secure lands and goods from despoilment or robbery.[8] In the Elizabethan statute which deals with the exactions in the northern counties, "commonly there called by the name of blackmail," it is worthy of note that the person who gave "money, corn, cattle, or other consideration, called blackmail" is guilty of felony equally with the robber or despoiler: the policy was to suppress blackmail by punishing the victim for being so timid as to submit to it instead of seeking the protection of the law. At first, therefore, blackmail implied a threat of violent injury to property and according to the Oxford dictionary was not used, by extension, in its modern sense until the nineteenth century. The first example given of its modern use is from the year 1840. It is curious to observe that this date almost coincides with that of the Libel Act, 1843, which first made criminal the blackmailing conduct described in section 31 of the Larceny Act. The only statutory use of blackmail in its modern sense seems to be in the Criminal Justice Administration Act, 1914,[9] where "divers forms of blackmail" is found a convenient phrase to denote the blackmailing offences under the Libel Act, 1843, and those under the Larceny Act, 1861, concerned with threats to accuse of and accusations of crime.

In *Thorne* v. *Motor Trade Association* where section 29 came before the House of Lords for the first time Lord Wright said:[10] "I think the word 'menace' is to be liberally construed and not as limited to threats of violence but as indicating threats of any action detrimental to or unpleasant to the person addressed." This opinion which makes possible a punishment of penal servitude for life for even the mildest kind of blackmail is generally accepted as being sound by the modern judges and magistrates who have so often denounced the offence in no unmeasured

[8] 43 Eliz. c. 13, preamble and s. 2 (repealed 7 & 8 G. 4 c. 27, s. 1); 4 Bl. Comm., 8th ed., 244.

[9] 4 & 5 G. 5 c. 58, s. 35 and sched. 3.

[10] 1937, A.C. 797, 817.

terms and sympathised with the meek victim of the outrage who yields to the threat of "any unpleasant action." Lord Atkin, on the other hand, in the same case, felt the attraction of a different interpretation: "If the matter came to us for decision for the first time I think there would be something to be said for a construction of 'menace' which connoted threats of violence and injury to person or property, and a contrast might be made between 'menaces' and 'threats' as used in other sections of the various statutes."[11] Is there something, or even much, to be said for this or some similar construction?

Before examining the statutes previous to the consolidating measure of 1861 it is necessary to consider how the blackmailer fares at common law which the statutes were designed to supplement. Three principles of the common law are in point, those of constructive robbery, extortion, and larceny by intimidation. The common law rules have a direct bearing on the problem of the interpretation of the statutory provisions, as will appear when they are considered later in this article.

(1) Constructive Robbery

Robbery has been extended but little from the obtaining of chattels by a present threat of immediate personal violence. But there are extensions of the original narrow limits of robbery, extensions which include certain cases of obtaining by means of other threats. If, therefore, in these cases the threat does not succeed in causing the property to be handed over the threatener will be guilty of an attempt to rob.

(*a*) *Threats to Accuse of Unnatural Offences.* Towards the end of the eighteenth century the definition of robbery was relaxed to make it include the obtaining of a chattel as an immediate consequence of a present threat to accuse of unnatural crime. The older definitions of robbery insist on the victim's being put in fear by a threat of personal violence.[12] But it can clearly be argued that a man may be moved to deliver his chattel through fear of other threats, and a passage in Hale, perhaps unintentionally qualifying his earlier definition, seems to assume that fear of personal violence is not essential. He says, "without putting in fear *or* violence it is not robbery."[13]

[11] *Ibid.* 806. In non-legal usage "threat" certainly seems to be a milder word than "menace."

[12] E.g. Hale, *Pleas of the Crown*, I, 532: "Robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear."

[13] *Ibid.*, 534 (italics inserted). He may mean, however, that there must be either actual violence or fear of violence. Blackstone also has "felonious and forcible taking from the person of another . . . by violence or putting him in fear," (4 Comm. 8th ed., 242).

R v. *Jones*[14] in 1776 is often taken as the case which established that a threat to accuse of sodomitical practices is a sufficient foundation for robbery but, although there was such a threat in this case, the twelve judges also found that "a sufficient degree of force had been made use of":[15] actual force was present as well as the threat to accuse. In *R* v. *Donnally*,[16] three years later, the point was fully discussed by Willes, J., in delivering the opinion of the judges. Willes, J., thought the question was whether the prisoner had used "that degree of violence, or inspired that degree of fear, which the law holds necessary," though he admitted that in the definition of robbery which he had previously enunciated on the basis of the definitions in the books, "these two words [i.e. violence and fear] are included as descriptive of the cause and the effect."[17] Nevertheless on the strength of some unconvincing analogies from the rules of robbery proper he concluded that a reasonable fear of danger, caused by the exercise of constructive violence, is sufficient. He thought that the threat was "equivalent to actual violence; for no violence that can be offered could excite a greater terror in the mind, or make a man sooner part with his money": there was a "reasonable fear, which might operate *in constantem virum* as well as *in meticulosem virum*."[18] On the facts of *R* v. *Donnally* there was also, as in *R* v. *Jones*, "a threat of personal violence, for the prosecutor had everything to fear in being dragged through the streets as a culprit charged with an unnatural crime,"[19] but it is doubtful whether this further threat can be regarded as part of the *ratio decidendi*. *R* v. *Donnally* was followed in *R* v. *Hickman*[20] in which there seems to have been no additional threat of personal interference. Ashhurst, J., in delivering the opinion of the judges, thought "a threat to accuse a man of having committed the greatest of all crimes" was "a sufficient force to constitute the crime of robbery by putting in fear": "to most men the idea of losing their fame and reputation is equally, if not more terrific than the dread of personal injury."[21]

The principle of constructive robbery thus accepted might

[14] 1 Leach 139.
[15] *Ibid.*, 141.
[16] (1779), 1 Leach 193.
[17] *Ibid.*, 196.
[18] *Ibid.*, 198. This rule regarding degrees of fear which is derived from Roman law is of far-reaching importance in the development of blackmail; see *infra*, pp. 33, 36, 46, etc.
[19] *Ibid.*, 197, 198.
[20] (1784), 1 Leach 278.
[21] *Ibid.*, 280. The same judge in *R* v. *Knewland* (1796), 2 Leach 721, 731, makes the fear of the results of such an imputation "equal to the fear of losing life itself."

have been developed to cover many other blackmailing threats, the offence being treated as robbery or attempted robbery according to whether the threats succeeded in their purpose or not. But the principle was not stretched much further and even in respect of threats to accuse of unnatural offences a reaction soon set in though it was short-lived. In *R* v. *Elmstead*[22] nine of the judges thought that *R* v. *Hickman* was binding, but the three others thought it not law. The conservative Lord Ellenborough, C.J., one of the three, pointed out, however, that there was a point of difference between that and the instant case in that in *R* v. *Elmstead* the prosecutor's principal inducement to part with his money was the fear of losing his employment: he was not actuated merely by fear for his reputation. Seven years later in *R* v. *Cannon*,[23] where there was actual constraint of the person besides the threat, the same three judges together with two others "thought some degree of force or violence essential and that the mere apprehension of danger to his character would not be sufficient to constitute the offence."[24] But five others "seemed to think it would" be sufficient. Finally, in *R* v. *Egerton*[25] where there was no actual or threatened personal constraint eleven of the judges thought that the case "was similar to *R* v. *Hickman* and that they could not with propriety depart from that decision"; Holroyd and Bayley, JJ., and Richards, C.B., expressly stated that they thought *R* v. *Hickman* was rightly decided as a charge of this description "carried with it such a degree of fear as might be expected to overcome a firm and constant mind"; and Graham, B., the survivor of the dissentients in *R* v. *Elmstead* and *R* v. *Cannon*, although he clung to his opinion that *R* v. *Hickman* was not righly decided, declared that he would be "influenced in future by what appeared to be the general opinion of the judges."

This form of constructive robbery was declared to be robbery by a statute of 1827,[26] becoming an innominate statutory felony ten years later.[27] The statute of 1837 was abolished in 1861[28] and not re-enacted, so presumably the offence can now be punished as simple robbery at common law.[29] It is to be noted that there is a distinction of substance between the offence as statutorily

[22] (1802), 2 *Russell on Crimes*, 795.
[23] (1809), Russ. & Ry. 146.
[24] *Ibid.*, 148.
[25] (1819), Russ. & Ry. 375.
[26] 7 & 8 G. 4 c. 29, s. 7.
[27] 7 W. 4 & 1 Vict. c. 87, s. 4.
[28] 24 & 25 Vict. c. 95, Sched.
[29] *R* v. *Stringer* (1842), 2 Mood. 261, in which the judges doubted *R* v. *Henry* (1840), 2 Mood. 118.

defined and as it exists at common law. The statutes did not include an accusation or threat to accuse of the conduct which has, since the Criminal Law Amendment Act, 1885, been punishable as indecency between males, but a threat to accuse of such conduct is sufficient for the purposes of robbery at common law.[30] Such a threat, if successful, therefore now carries a punishment of fourteen years' penal servitude as simple robbery.[31] This is of importance, for if "menaces" in sections 29 and 30 of the Larceny Act does not include such a threat the only charge alternative to one of robbery would be one under section 31, which carries a sentence of only two years' imprisonment.

There is a limit to the usefulness of constructive robbery as a possible charge in that "the money must be taken immediately upon the threat made, and not after the parties have separated, and time for the prosecutor to deliberate and procure assistance."[32] The victim of the blackmailer who gives him time to pay has not been robbed if he pays up later. Nor is there liability if he parts with his property merely for the purpose of prosecuting.[33] Further, this form of constructive robbery is confined to threats made to the party himself and therefore one who obtained from a married woman her husband's money by means of a threat, uttered to her, to accuse him of unnatural crime was not guilty.[34] As Littledale, J., said[34]: "The principle is that the person threatened is thrown off his guard, and has not the firmness to resist the extortion; but he could not apply that principle to the wife of the party threatened." In contrast with this rule, the accusation of crime under section 29 of the Larceny Act need not concern the person to whom the threats are addressed, nor need the libel or other matter under section 31. But the fact that the prosecutor was really guilty of the crime is no more relevant to a charge of robbery[35] than it is to a charge of "blackmail" under the Larceny Act.

(*b*) *Threats to Property.* It is said in *Russell on Crimes*[36] that "the cases in which robbery has been committed by means of a fear of injury to the property of the party are principally those in which the terror excited was of the probable outrages of a mob." It would seem that there was fear of rioters in all the

[30] *R* v. *Norton* (1838), 8 C. & P. 671. In *R* v. *Stringer*, *op. cit.*, this type of threat was assumed to be sufficient.

[31] Under sub-section (2) of s. 23 of the Larceny Act, 1916, which lays down a scale of punishments for robbery which it does not, however, define.

[32] *R* v. *Jackson* (1802), 1 East P.C., Add. 21 (and see 1 Leach 193, n. a), *per* Graham, B.

[33] *R* v. *Reane* (1794), 2 Leach 616.

[34] *R* v. *Edwards* (1833), 1 M. & Rob. 257.

[35] *R* v. *Gardner* (1824), 1 C. & P. 479.

[36] Vol. 2, 785.

cases which, in the main, arose out of the Gordon riots and the agricultural riots of 1830.[37] Most of the cases are assize decisions reported only in East's *Pleas of the Crown*. As it is the essence of a riot that the persons constituting it should intend to carry out their purpose with violence, to the terror of the people, no great strain seems to be put upon the common law conception of robbery. East puts the query[38] whether "the threat of burning down a man's dwelling-house by a mob do not in itself convey a threat of personal danger to the occupiers." It may be conjectured that when the law of robbery was thus extended it was not far from the minds of the judges that rioters, if the Riot Act had not been read, could only be punished with imprisonment, while robbers, being guilty of felony, could be punished capitally or by transportation.

There is no clear instance of the extortion of property by a threat of damage to property, unaccompanied by circumstances of riot, being treated as robbery. But Hawkins says "the dispersing of bills of menace, threatening destruction to the lives or properties of those to whom they were addressed, for the purpose of extorting money, is at the common law a high misdemeanour, punishable by fine and imprisonment."[39] He gives only Hale as his authority for this statement, though Hale bases himself on a statute of Henry 6 now repealed.[40] There is no hint in Hawkins's chapter "Of Sending a Threatening Letter," from which his statement is taken, that any other kind of threat for the purpose of extortion is punishable at common law.

(*c*) *Other Extensions*. The very limited development of robbery is shown by the case of *R* v. *Knewland*[41] in which there was a measure of actual physical intimidation. It was held that to obtain money by a threat to send for a constable and take the party before a magistrate and from thence to prison was not robbery, even though the threat was accompanied by detention in a room until the pretended constable came. Ashhurst, J., in delivering the opinion of the judges, declared[42] that "the force and terror necessary in contemplation of law to perfect this species of crime" was wanting: "Terror is of two kinds; namely, a terror which leads the mind of the party to apprehend an injury to his person, or a terror which leads him to apprehend an injury to his character." The latter kind, he said, was

[37] 2 East, P.C., 712, 729, 731; *R* v. *Winkworth* (1830), 4 C. & P. 444.
[38] *Op. cit.*, 729, n.
[39] *Pleas of the Crown*, Bk. I, c. 53, s. 1, vol. 1 (7th ed.), 585.
[40] *Op. cit.*, 567: 8 H. 6 c. 6, repealed Statute Law Revision Act, 1863, 26 & 27 Vict. c. 125.
[41] (1796), 2 Leach 721.
[42] *Ibid.*, 730.

confined only to threats to accuse of sodomitical practices; and the intimidation used in the instant case amounted only to simple duress for which there was a civil remedy. The force used against the prosecutrix was "merely that of pushing her into the sale-room and detaining her until she gave the shilling; but as terror is, no less than force, a component part of the complex idea annexed to the term robbery, the crime cannot be complete without it."[43] With this case can be contrasted *R* v. *Hughes*[44] in which the accused was convicted of robbery, he being one of several persons who "hung around the prosecutor's person in the streets and rifled him of his watch and money." It did not appear that actual force was used or any direct menace, but "they so surrounded him as to render all attempt at resistance hazardous, if not vain." Bayley, J., said: "In order to constitute robbery, there must be either force or menaces. If several persons so surround another as to take away the power of resistance, this is force." Here "menaces" is clearly used in the sense of threats of immediate physical force: it is robbery if a sufficient degree of physical force is applied to the prosecutor or if he is menaced with it on the spot. But there are dicta[45] to the effect that a threat of immediate death to the child of the prosecutor is sufficient.

The law of robbery has never departed from the rule that a threat of physical hurt must be a threat of immediate physical hurt. The highwayman who gives you the choice of "your money," now, or "your life," next week, is not a robber.

(2) Extortion at Common Law

The usual meaning of extortion at common law and under certain old statutes is an unwarranted extortion by an official who takes more than his due *colore officii*. This form of extortion may be left out of account, but there is some evidence that extortion by a person other than an official was also a common law misdemeanour. It was held in *R* v. *Woodward*[46] that obtaining money by a threat to imprison and indict for perjury was an offence at common law. Holt, C.J., declared: "Every extortion is an actual trespass, and an action of trespass will lie against a man for frighting another out of his money. If a man will make use of a process of law to terrify another out of his money, it is such a trespass as an indictment will lie." This seems to be the

[43] *Ibid.*, 731.
[44] (1825), 1 Lewin 301.
[45] *Per* Hotham, B., in *R* v. *Donnally* (1779) (report in 2 East, P.C., 718; see 5 C. & P. 519 n. 2) and Eyre, C.J., in *R* v. *Reane* (1794), 2 Leach 619, n. *a*.
[46] (1707), 11 Mod. 137.

only authority[47] in the reports and textbooks from the time of Coke onwards for the crime of what may be called private extortion and a narrow interpretation was placed upon it in *R* v. *Southerton*.[48] It was there explained by Lord Ellenborough, C.J., and Grose and Lawrence, JJ., that in *R* v. *Woodward* the prosecutor was in the actual custody of the prisoner at the time he was threatened: there was an actual duress such as would have avoided a bond given under the same circumstances and it therefore could not be said that there was not such a threat as a man of ordinary firmness could not resist.

So far as private extortion is a misdemeanour, the argument of counsel in *R* v. *Southerton* is sound, namely, that the extortionate threat without actual extortion can be punished as a criminal attempt.[49] But the decision in *R* v. *Southerton* effectively checked any possibility of development there may have been in the principle recognised in *R* v. *Woodward*. It was held to be no offence at common law to obtain money by means of a threat to bring a penal action and the *ratio decidendi* would apply also to a threat to prosecute for any crime. Lord Ellenborough, C.J., while conceding that to obtain money under a threat of any kind is an immoral action, said that to make it indictable the threat must be of such a nature as is calculated to overcome a firm and prudent man; the threat to bring a penal action, however, was "not such a threat as a firm and prudent man might not and ought not to have resisted." He continued: "The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases under the influence of such threats may amount to robbery, but not so in cases of threats of other kinds."[50] Lawrence, J., pointed out that the criterion of the man of ordinary prudence and firmness "was adopted by the old law with respect to such as were deterred by threats from making entries into land which they claimed. The threats must be such as will deter *virum fortem et constantem* from entering on the land . . . there

[47] In practice the Courts may have taken a wider view in cases which never came into the printed reports. E.g. in *R* v. *Somersall* (1614) Quarter Sessions punished as a misdemeanour the obtaining of money "to avoid the unjust clamours" to the effect that the prosecutor was the father of the prisoner's child: Midd. Sess. Records, N.S., II, ed. W. Le Hardy, 1936, p. 164.

[48] (1805), 6 East 126.

[49] In 1788 a person was indicted at Quarter Sessions "for endeavouring to extort money from E. T. by charging him with an attempt to commit sodomy": Calendar to Sessions Books, Herts. County Records, VIII, 1935, ed. W. Le Hardy, p. 378.

[50] 6 East, p. 140, 141.

must be a fear of personal violence."[51] The learned judge concluded: "When the defendant threatened to prosecute the party for the penalties, a man of ordinary firmness might have well said to him that he was not guilty of the offence charged, and therefore he might prosecute him at his peril."

The result is that the blackmailer has little to fear from the meaning of extortion at common law though the principle of *R* v. *Southerton* was relaxed by Littledale, J., in *R* v. *Edwards*[52] at assizes. The obtaining of money from a wife by a threat to accuse her husband of an unnatural offence, although the prisoner was acquitted of constructive robbery, was punished as a misdemeanour. His lordship admitted that "even as a misdemeanour, the case was new."

(3) Larceny by Intimidation

Under the Larceny Act of 1916, unlike that of 1861, the expression "takes" in the definition of larceny includes obtaining possession "by intimidation." This addition to the statutory definition is intended to embody the effect of the decision in *R* v. *McGrath*.[53] Taking by an act of intimidation sufficient for the purposes of robbery has always amounted to larceny for a robbery includes a larceny, being merely one species of that offence, but in *R* v. *McGrath* the accused was charged only with larceny and the threats he used were probably insufficient for the more serious offence.[54] He and a confederate prevented the prosecutrix from leaving an auction-room until she had paid for goods which she had not bid for; in consequence of being thus frightened, she paid the money. The conviction was upheld. Blackburn, J., said[55] that if goods are obtained by force, then a robbery is committed, but that "force is not a necessary ingredient in larceny": "It is sufficient to constitute a larceny if the goods are obtained against the will of the owner. It would be a scandal to the law if goods could be obtained by frightening the owner, and yet that this should not constitute a taking within the meaning of the definitions of larceny. The material ingredient is

[51] *Ibid.*, 142, 143. The criterion of *vir fortis et constans*, as distinct from *vir vanus* or *meticulosus*, is to be found in Bracton (ed. Woodbine II, 296) and derives from Roman law (D. 4, 2, 6). See generally, *A Fourteenth Century Phrase*, by Tout (Collected Papers, II, 285 *et seq.*). It applies, in addition, to the duress which avoids a deed: "It must not be a vaine feare but such as may befall a constant man" (Co. Litt. 253 *b*).

[52] (1833), 1 M. & Rob. 257, and see *supra* p. 28.

[53] L.R. 1 C.C.R. 205, followed, *R* v. *Hazell* (1870), 23 L.T. 562, and *R* v. *Lovell* 8 Q.B.D. 185.

[54] Cp. the facts and the decision in *R* v. *Knewland* (1796), 2 Leach 721, *supra* p. 29.

[55] L.R. 1 C.C.R., p. 210.

that the goods should be obtained against the will of the owner." But no authority could be cited for this desirable extension of the common law. As Hawkins said[56]: "Larceny from the person of a man either puts him in fear, and then it is called robbery; or does not put him in fear, and then it is called barely, larceny from the person." And fear was very narrowly defined. *R* v. *McGrath* holds that a man's will may be overcome by action which would not have disturbed the firm and constant man as the older judges understood him. The case is only one of several instances in which nineteenth and twentieth century judges, reflecting the thought of their generation, have expressed a poorer opinion than their ancestors of the power of the will and thereby extended the law of blackmail.

The importance of the conception of larceny by intimidation is the bearing it may have on the statutory offence of demanding money "with menaces or by force with intent to steal." In *R* v. *Lovell*[57] the accused, who was found to have "assumed a menacing attitude" towards the prosecutrix, demanded money, saying, "I will make you pay." He was charged with stealing and with demanding with menaces with intent to steal. The woman being frightened into handing over the money, he was convicted of larceny, the Court for Crown Cases Reserved simply following *R* v. *McGrath*. Presumably the prisoner would have been convicted on the second charge of demanding with menaces with intent to steal if she had not yielded to his demand. The case prompts the question, to be discussed below, whether "menaces" in section 30 of the Larceny Act ought not to be limited to such menaces as, if successful in their object, would constitute larceny by intimidation and, *a fortiori*, to such as would constitute that form of larceny called robbery. Does "intent to steal" in section 30 imply all the elements of stealing short of "taking"?

We are now in a position to appreciate the shortcomings of whatever common law there is on the subject of blackmail and the relation of the statutory provisions to the common law.

Threats to Accuse of Crime: Section 29 (1) (ii) and (iii)

The background of this form of blackmail has been discussed already.[58] The statutory provisions which date from the eighteenth century supply many of the defects of constructive robbery and of common law extortion so far as they are concerned with

[56] *Op. cit.*, 233. Cp. Hale, *op. cit.*, 503. It appears to have been assumed in s. 2 of 48 G. 3 c. 129 in dealing with larceny from the person that robbery is the only form of stealing by intimidating known to the law.

[57] 8 Q.B.D. 185.

[58] *Supra*, p. 25.

threats to accuse of crime. But although the section covers many more threats than are recognised to be of sufficient gravity for the purposes of the common law offences, it does not cover all the ground: it is limited to threats to accuse of crimes punishable with not less than seven years' penal servitude and certain sexual crimes. Again, in contrast with the common law offences, the statutory provisions are directed against the threat, as such: it makes no difference that the property demanded is not handed over. Further, under the statute the threat, which may be written as well as oral, need not be made in the presence of the prosecutor, nor with the intention to induce an immediate transference of the property. And "any property or valuable thing" covers more than chattels.

Written Demands with Menaces without any Reasonable or Probable Cause: Section 29 (1) (i)

It was under the consolidating and amending Act of 1827 that for the first time "any letter or writing demanding of any person, with menaces, and without reasonable or probable cause" was made the object of a penal enactment.[59] This enactment was intended to replace one passed four years previously[60] in which the wording is different, namely, "demanding money or other valuable thing" with no mention of menaces or of reasonable or probable cause. The Act of 1823 was also replacing an earlier Act, one of 1722 concerned with certain anonymous letters or writings.[61] This Act, which is the origin of the modern offence, is the Waltham Black Act or simply the Black Act passed as a result of the disorders caused by the Waltham Blacks, deer-stealers operating mainly near Waltham with their faces blackened.[62] This statute, entitled, "An Act for the more effectual punishing wicked and evil-disposed persons going armed in disguise, and doing injuries and violences to the persons and properties of His Majesty's subjects, and for the more speedy bringing the offenders to justice," enumerates in section 1 many of their activities which are for the future to be felonies punishable with death. Between two provisions dealing respectively with wilful and malicious shooting at any person in any dwelling-house and forcible rescue from lawful custody of any offender against the Act, are these words: "or shall knowingly send any

[59] 7 & 8 G. 4 c. 29, s. 8; re-enacted by the Larceny Act, 1861, s. 44.

[60] 4 G. 4 c. 54, s. 3; repealed by the great repealing statute 7 & 8 G. 4 c. 27, which cleared the ground for the various consolidating statutes of 1827.

[61] 9 G. 1 c. 22, s. 1. Since the Act of 1823 there has been no need for the letter to be anonymous or signed with a fictitious name.

[62] 4 Bl. Comm., 8th ed., 245; Gilbert White, *Natural History of Selborne*, Letter VII.

letter, without any name subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing." In the preamble which recites the enormities of the Waltham Blacks it is said that they "have sent letters in fictitious names, to several persons, demanding venison and money, and threatening some great violence, if such their unlawful demands should be refused."

In view of the declared subject of the Act and the words of the preamble there can be no doubt that in the intention of Parliament the uncertain word "demanding" in section 1 implied a demand coupled with a threat of violence whether to the person or to property. The section had a purpose similar to that of the old statute which punished, as Hale stated,[63] the "dispersing of bills of menace to burn houses, if money be not laid down in a certain place."

In the first case, *R* v. *Robinson*,[64] in which the provision of the Black Act was used to punish "blackmail" in its modern sense counsel urged the obvious argument that the preamble and punishment meant that there must be a threat of violence to person or property. The accused had sent a letter demanding property with a threat to accuse of murder. Under an Act of 1757[65] a letter threatening to accuse of a capital offence or one punished with an infamous punishment, with intent to extort or gain, had been made punishable with seven years' transportation, as contrasted with the capital sentence attached to the Black Act. It was reasonable to say that the accused had been indicted under the wrong statute. Nevertheless his conviction was upheld, Buller, J., delivering the opinion of the judges[66]: "The statute speaks of a demand generally, without requiring any particular circumstances other than a letter. . . . It is no uncommon thing for the preamble of a statute to recite a particular mischief as the cause of making it, and yet for the enacting part to embrace more general objects, and to extend to other cases which the legislature thought within the mischief." Would the judges have allowed the Act to embrace "demands" coupled with threats not otherwise criminal as they were in *R* v. *Robinson*? There is no answer to this question: the next case on the subject arose after the addition of the elements of menaces and reasonable or probable cause.

If "demanding" be given its literal meaning, to which interpretation the decision in *R* v. *Robinson* points the way, the offence

[63] *Op. cit.*, 567; *supra*, p. 29.
[64] (1792), 2 Leach 749.
[65] 30 G. 2 c. 24, s. 1; *supra*, p. 23.
[66] 2 Leach 765.

becomes impossibly wide. The written imperative, "Give me £5," would be a felony even though there was no threat of evil or unpleasantness on failure to comply. Section 8 of the amending statute of 1827[67] which required the demand to be with menaces and without reasonable or probable cause was intended to circumscribe the offence and make it more definite. It would seem that "menaces" in section 8 was intended to have the same meaning as "menaces" in section 6 of the same Act, thus making the offence the written equivalent of the oral demand "with menaces or by force" and at the same time making the new definition comply with the declared purpose of the superseded Black Act. Section 6 deals among other things with demanding with menaces with intent to steal and it is hoped to demonstrate below that this latter offence was originally limited to threatened violence to person or property and ought still, as a matter of logic, to be so limited. The offence with which we are now concerned was extended but slowly beyond these limits by judicial decisions.

In *R* v. *Smith*[68] there was a threat to burn the prosecutor's premises unless he gave the accused a sum of money. It was argued for the defence that the true rule of the common law laid down by Lord Ellenborough, C.J., in *R* v. *Southerton*[69] with regard to the powers of resistance to threats possessed by the firm and constant man must apply also to indictments under the statute, but the conviction was upheld. Wilde, C.J., in delivering the opinion of the five judges who heard the case said that the common law rule "must be understood to refer rather to the nature of the threat, than its probable consequences in any particular case. Whether a threat be criminal or no, cannot be taken to depend on the nerves of the individual threatened, but on the general nature of the evil with which he is threatened. Threats attended with duress, or threats of duress, or of other personal violence, *or of great injury, such as is imported by this letter* will come within the rule."[70] The injury threatened in the letter was that of arson. Thus, although the standard of the firm and constant man is relevant under the statute, it must not be taken to be a rigid criterion, as it is at common law, but one capable of extension. In the non-criminal law of duress the common law laid down dogmatically that only actual personal constraint or threats of immediate violence to himself or his wife or family was sufficient to overcome *virum fortem et constantem.*

[67] 7 & 8 G. 4 c. 29; *supra*, p. 34.
[68] (1849), 1 Den. 510, C.C.R.
[69] (1805), 6 East 126; *supra*, p. 31.
[70] 1 Den. p. 514; italics inserted.

The law of duress has never been extended beyond these limits[71] and Lord Ellenborough applied the same restrictions to the common law crime of extortion. But in *R* v. *Smith* there was a refusal to apply the old strict rules to statute. In this decision the standard of the firm and constant man is no more definite than that of the reasonable man or the *bonus paterfamilias*. Subsequent cases show how elastic the conception has become in relation to statutory offences.

The only point discussed in *R* v. *Hamilton*[72] was the meaning of reasonable or probable cause and it seems to have been assumed that it was a menace within the meaning of the Act to threaten to reveal that the prosecutrix had visited a brothel in company with a man. A similar assumption was made in *R* v. *Miard*[73] where there was a threat to expose a clergyman who was said to have had intercourse with a woman in a brothel and in his own church. The decision was doubted in *R* v. *Dymond*[74] but only because of the interpretation given to "reasonable or probable cause." The facts of these cases would have supported a conviction of threatening to publish any matter with intent to extort under the Libel Act, 1843, which came into force about the same time. The briefly reported case of *R* v. *Chalmers*,[75] at a later date, is of no assistance for the letter contained a threat of personal violence as well as a threat to accuse of adultery with the prisoner's wife and to send the alleged child of the prosecutor to his house: counsel admitted that he could not argue that the letter "did not contain menaces of personal violence" and Kelly, C.B., in reserving the case for the consideration of the judges, noted that if no "one of the threats or menaces in the letter was a menace within the statute, the conviction is to be quashed, otherwise affirmed." The conviction was affirmed.

So few cases on the subject are reported that it is impossible to say whether the blackmailer in the nineteenth century who did not threaten violence was usually proceeded against under section 3 of the Libel Act, 1843, or under the precursors of section 29 of the Larceny Act, 1916. The criminal statistics are not sufficiently detailed to be of assistance. Whatever the practice may have been, it was not until *R* v. *Tomlinson*[76] in 1895 that there was indisputable authority for interpreting "menaces"

[71] But the law has been supplemented by the development of the action for "money paid" under compulsion and the equitable doctrine of pressure (undue influence).

[72] (1843), 1 C. & K. 212.

[73] (1844), 1 Cox, C.C. 22.

[74] 1920, 2 K.B. 260.

[75] (1867), 16 L.T. 363, C.C.R.

[76] 1895, 1 Q.B. 706, C.C.R.

in a wide sense. The accused was convicted of sending a letter demanding money with menaces and without reasonable or probable cause, the threat being to let the prosecutor's wife and friends know of his alleged immoral relations with a woman. Lord Russell of Killowen, C.J., who delivered the main judgment of the Court for Crown Cases Reserved (Pollock, B., and Wills, Charles, and Lawrance, JJ.) thought that the case was not free from difficulty and regretted that it had not been argued before them: no counsel appeared on either side. At the trial counsel had argued that "menaces" imported a threat of injury to the person or property. The Lord Chief Justice said[77]: "I should have regretted if the Court had felt compelled to confine the construction of the word 'menaces' in the way suggested, with the result of excluding such conduct as that of the prisoner from the purview of the criminal law . . . it may well be held (though I am laying down no exhaustive definition of the word) to include menaces or threats of a danger by an accusation of misconduct, though of misconduct not amounting to a crime, and that it is not confined to a threat of injury to the person or property of the person threatened." The conviction was upheld. We may regret that counsel did not appear to point out that the conduct of the accused could have been punished by proceeding under the Libel Act, 1843. Lord Russell of Killowen consulted no fewer than five dictionaries on the meaning of the word menace; a sounder guide to its legal import would have been found in the history of the section in which it was contained. The old principle of the firm and constant man treasured by Coke and Lord Ellenborough received its virtual death blow from those who were more stern to punish than to insist that resistance must be made to the evildoer. Wills, J., said[78]: "With regard to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind, I only desire to say that it ought, in my judgment, to receive a liberal construction in practice; otherwise great injustice may be done, for persons who are thus practised upon are not as a rule of average firmness; but I quite appreciate the fact that the threat must not be one that ought to influence nobody."

Some reliance was placed in *R* v. *Tomlinson*, particularly by Wills, J., on section 49 of the Larceny Act, 1861, now re-enacted by section 29 (4): "For the purposes of this Act, it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person."

[77] *Ibid.*, 708, 709.
[78] *Ibid.*, 710.

Wills, J., said that "that which will do a person harm comes, in my opinion, within the meaning of 'injury'." With this opinion can be contrasted that of Erle, C.J., in *R* v. *Walton*[79] about the same provision: "The word injury may refer to injury to property," as if to say, "and to nothing else." This seems to be the correct interpretation. The provision was not intended to explain or enlarge the meaning of the kind of threatened evil which "menaces" properly imports but to provide for the threat of an evil to be visited by a person other than the accused, he being responsible for the letter containing the demand and the threat, to be carried out by another hand than his. Such a threat was not within the terms of the Act of 1827[80] and the provision was designed to fill the gap. Nevertheless the same argument as that of Wills, J., was used to give support to the decision in *R* v. *Denyer*[81] in which only trifling consideration was given to the element of "menaces" compared to that given to "reasonable or probable cause." In *R* v. *Dymond*[82] the word "menaces" was not considered at all. Thus the result of the decision in *R* v. *Tomlinson* which Lord Russell of Killowen, C.J., regretted was not argued before the Court for Crown Cases Reserved, has been eagerly accepted, almost without question, by the Court of Criminal Appeal. The modern attitude is strikingly evidenced in *R* v. *Kendrick*.[83] The appellant had been charged in two counts, under section 29 (1) (i), and under section 31 with threatening to publish matter with intent to extort. He was convicted of the latter offence but the jury disagreed about the former: on the subsequent trial on the former charge alone he pleaded *autrefois convict*. As the success of this plea depended on the question whether the two offences were the same or practically the same it was necessary to explain the distinction, but the Court of Criminal Appeal, in upholding the second conviction, did not attempt to say what the substantive distinction was, referring only to the great divergence of punishment under the two sections. The Court was content to declare[84]: "It is not necessary to say more than that the former was framed under section 29 of the Larceny Act, 1916, while the latter was framed under

[79] (1863) (Le. & Ca. 288), report in 32 L.J.M.C., p. 80. "Accusation" in the sub-section relates to accusation of the crimes which the section covers.

[80] *R* v. *Pickford* (1830), 4 C. & P. 227. Scrutton, L.J., in *Hardie & Lane* v. *Chilton*, 1928, 2 K.B. 306, 321, found sub-section (4) of s. 29 "not very intelligible" because he did not appreciate that its significance is to be found in the last five words.

[81] (1926), 2 K.B. 258, 266, Ct.C.A.

[82] 1920, 2 K.B. 260, Ct.C.A.

[83] (1931), 23 Cr. App. R. 1.

[84] *Ibid.*, 5 (Swift, Wright & Humphreys, JJ.).

section 31 to show how completely different the offences were." Such an evasion of the problem seems now to be generally acceptable.

In *Thorne* v. *Motor Trade Association*, Lords Atkin and Thankerton said[85] that "the gravemen of the charge" is the demand without reasonable or probable cause, the latter thinking[86] that it was "unnecessary to consider whether in any other respects" the letter in question "need not fall within the terms of the sub-section." Lords Roche and Russell of Killowen did not devote a word to the meaning of "menaces." For Lord Wright "the crucial question" was whether there was "an absence of reasonable or probable cause,"[87] though he thought the word "menaces" ought to be construed in the very wide sense described in the passage from his judgment quoted above.[88] Lord Atkin said[89] that in several cases it has been decided that "menaces" is simply equivalent to threats and as the Larceny Act, 1916, was passed after those decisions they must be accepted but he agreed, in the words quoted at the beginning of this article, that if the matter had come to the House of Lords for decision for the first time there would be something to be said for limiting the word "menaces" to threats of violence and injury to person or property. The appeal to the House of Lords was based on the correct interpretation to be given to reasonable or probable cause and three of the judges gave no opinion on the meaning of menaces, Lord Thankerton expressly refusing to consider any other element than that of reasonable or probable cause. The opinions of Lord Wright and Lord Atkin on the construction of "menaces," therefore, seem to be *obiter dicta*: it could perhaps be maintained that *Thorne* v. *Motor Trade Association* adds no higher authority to the decisions of the Criminal Appeal Courts in support of their wide interpretation of menaces.

If it be true that the decision in *R* v. *Tomlinson*[90] was wrong in holding that the word is not to be limited to threats to person or property, what was the function originally intended to be fulfilled by the words "and without reasonable or probable cause"? Dr. C. K. Allen's surmise is attractive, that "this seems to be one of the not infrequent cases of a legal *cliché* being repeated from Act to Act, or from case to case, by sheer force

[85] 1937, A.C. 797, pp. 806 and 802.
[86] *Ibid.*, 810.
[87] *Ibid.*, 817.
[88] *Supra*, p. 24.
[89] *Ibid.*, 806; he cites *R* v. *Boyle*, 1914, 3 K.B. 339, Ct.C.A. which, however, is concerned with the s. 30 offence; see *infra* p. 45.
[90] (1895), 1 Q.B. 706, C.C.R.

of habit and without any exact analysis."[91] But the legislature in 1827 probably intended the words to have a definite purpose. As has been explained above, Parliament was attempting to restrict the meaning of the dangerously wide word "demanding," *sans phrase*, and specific justifications were probably intended to be implied by the terms in which the restriction was imposed. The offence, it seems, was meant to be parallel to that of demanding by force or with menaces with intent to steal. Here "intent to steal" connotes absence of a *bona fide* claim to the property demanded and there is no need to add "without reasonable or probable cause": there can be no intent to steal unless, if the property demanded were handed over, it would amount to stealing. But in its written form successful blackmail does not amount to stealing because there is no "taking" as "taking" implies either personal taking of the property by the thief without the owner's consent or the overcoming of his consent by threats in his presence. The qualification "with intent to steal" would therefore be inapt in the case of a written demand with menaces, but the purpose of that phrase in excluding *bona fide* claims is more appropriately fulfilled by the words "without reasonable or probable cause." Rolfe, B., said in *R* v. *Hamilton*[92] that the words "clearly applied to the money demanded, and not to the accusation constituting the threat." The same explanation appears more fully in the judgment of the Court for Crown Cases Reserved in *R* v. *Walton*[93] delivered by Wilde, B. Speaking of the Larceny Act, 1861, as a whole, he said[94]: "There are many demands for money or property accompanied by menaces or threats, which are obviously not criminal or intended to be made so. Thus, in case of disputed title to personal property, a man may threaten his opponent with personal violence if he does not relinquish the subject of dispute, and he would not be within the intention of this statute."

The earlier authorities were, however, departed from in *R* v. *Dymond*[95] in which it was held to be no defence that the prisoner honestly believed that he had a reasonable or probable cause for making the demand. There is now no mental element common to section 29 (1) (i) and section 30 and the written and oral forms of blackmail no longer form a logical pattern.

[91] 54 L.Q.R. 15

[92] (1843), 1 C. & K. 212. The same view was taken in the Court for Crown Cases Reserved in *R* v. *Miard*, 1 Cox C.C. 22, and *R* v. *Chalmers*, 16 L.T. 363, 10 Cox C.C. 450.

[93] (1863), Le. & Ca. 288.

[94] *Ibid.*, 297.

[95] 1920, 2 K.B. 260, Ct.C.A. (Lord Reading, C.J., Shearman and Sankey, JJ.).

Demands with Menaces or by Force with Intent to Steal: Section 30

This offence appears in a statute of 1837,[96] "An Act to amend the Laws relating to Robbery and Stealing from the Person," of which section 7 is devoted to persons who "with menaces or by force, demand any property of any person with intent to steal." This section re-enacts an identical provision in the consolidating Act of 1827[97] where, however, the provision is found in the same section as provisions dealing with actual robbery, stealing from the person, and assault with intent to rob. As regards assault with intent to rob and demanding with menaces or by force with intent to steal, this latter section simply re-enacts section 5 of the criminal statute of 1823.[98] And section 5 repeals and professes to make better provision for the punishment of offenders against an Act of 1734[99] and to amend the Act. That Act is "an Act for the more effectual Punishment of Assaults with Intent to commit Robbery" and in section 1 we have the first form of the offence now contained in section 30 of the Larceny Act, 1916.

The Act of 1734 recites that "many of His Majesty's subjects have of late frequently been put in great fear and danger of their lives by wicked and ill-disposed persons assaulting and attempting to rob them" and declares to be felony the conduct of such persons who "with any offensive weapon or instrument, unlawfully and maliciously assault, or shall by menaces, or in or by any forcible or violent manner, demand any money, goods or chattels, of or from any other person or persons with a felonious intent to rob or commit robbery." In its original context there can be no doubt that "menaces" means such menaces as, if the demand accompanying them be complied with, robbery is committed: the words "with intent to rob" make this clear and they give effect to the declared object of the Act. There can be no intent to rob unless the handing over of the property demanded amounts to robbery. Therefore, "menaces" in section 1 meant present threats of immediate battery if the property be not delivered up to the accused. A demand with menaces stands in contrast, firstly, with a demand in a forcible or violent manner, which seems to imply a battery; secondly, with a particular kind of assault (with an offensive weapon or instrument), the assault not being required to be accompanied with a "demand" because the felon may intend to commit robbery by himself taking the

[96] 7 W. 4 & 1 Vict. c. 87, re-enacted by s. 45 of the Larceny Act, 1861.
[97] 7 & 8 G. 4 c. 29, s. 6.
[98] 4 G. 4 c. 54, repealed 7 & 8 G. 4 c. 27.
[99] 7 G. 2 c. 21.

property from his victim after he has been made to submit through the fear induced by the assault. This second contrast is not essentially affected by the creation in 1823 of the offence of "assault with intent to rob" without any necessity for the assault to be with an offensive weapon or instrument. As regards the first contrast, the Act of 1823 changed the wording slightly by speaking of demanding "with menaces or by force" and these words are now incorporated in section 30 of the Larceny Act and separated from the other types of attempted robbery which are now to be found in the "robbery section," section 23. A more important change was made in 1823 by the substitution of "with intent to steal" for "with intent to rob or commit robbery." Has this substitution altered the essential nature of the offence from a statutory form of attempted robbery to "blackmail" in its wide modern sense?

In 1823 the change was of no significance but merely introduced what was then a more logical form of words. Larceny by intimidation had not then been recognised as a kind of larceny distinct from the kind which was known as robbery. It was only threats of the gravity required in robbery which caused the delivery of the property to be stealing and therefore it was only these threats which could accompany an "intent to steal." The words "with intent to steal" implied that the menaces or force must be of such gravity as to make the delivery of the property robbery. It was more logical to introduce the mental element of larceny with "intent to steal" rather than "with intent to rob" because robbery is simply a kind of stealing and in stealing the mental element is always the same. The physical element in the only kind of larceny which could be intended (viz. robbery) had been introduced already by the previous words in the sentence, "with menaces or by force."

The offence of demanding with menaces with larcenous intent had by 1823 been extended somewhat with the growth of constructive robbery and it would logically be extended further as soon as larceny by intimidation developed. But could the meaning of menaces be still further expanded beyond threats to accuse of unnatural crime, certain threats to property, and the comparatively mild threats to the person sufficient in larceny by intimidation? There are few cases on the subject and no further extension was established until the present century.

The old and accurate meaning of menaces was accepted in *R* v. *Walton*.[100] The prisoner had been convicted of demanding money with menaces with intent to steal, he having threatened

[100] (1863), Le. & Ca. 288.

to execute a distress warrant which he had no authority to do, but the Court for Crown Cases Reserved quashed the conviction because the trial judge had directed the jury, as a matter of law, that the conduct of the prisoner constituted a menace within the meaning of the Act. As Wilde, B., said in delivering the judgment of the Court[101]: "The essential matter is that it [the degree of alarm excited] be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free, voluntary action which alone constitutes consent. Now, to apply this principle to the present case, a threat or menace to execute a distress warrant is not necessarily of a character to excite either fear or alarm. On the other hand, the menace may be made with such gestures and demeanour, or with such unnecessarily violent acts, or under such circumstances of intimidation as to have that effect."[102] Counsel for the Crown and for the prisoner both argued on the basis that the menaces under the Act must be of the robbery kind; and when the former submitted that there was "such a menace as, if the money had been obtained by means of it, would have amounted to robbery," because property had been threatened, Blackburn, J., interjected the qualifying remark about the occasions on which threats to property had been held sufficient: "It should be remembered that those were times of great riot."[103] In the judgment the Court answered its question, "Where then is the proper limit to the operation of the section?" in these terms[104]: "It is to be found in the words 'with intent to steal.' There is no other restriction expressed. Nothing is said about 'violence' in conjunction with menaces, still less about violence to the person as distinct from violence to property. There is no express limit, except in the words 'with intent to steal.' Now, a demand of money with intent to steal, if successful must amount to stealing. It is impossible to imagine a demand for money with intent to steal, and the money obtained upon that demand, and yet no stealing. The question then arises, What are the incidents attending the procurement of money or property by menaces or threats necessary to constitute stealing?" And the implied limitation

[101] *Ibid.*, 298 (Erle, C.J., Blackburn, Keating, & Mellor, JJ.).

[102] Cp. Channell, B's. explanation of this case in *R* v. *Robertson* (1864), Le. & Ca. 483, 487: The jury "ought to have been asked, the threat not being necessarily of a character to excite alarm, whether it was made under such circumstances of intimidation as to have that effect."

[103] *Ibid.*, 292, 293. The opinion of Pollock, C.B., at Assizes (after consultation with Cockburn, C.J.) that a threat to burn the prosecutor's property, there being no riotous circumstances, is sufficient under the Act (*R* v. *Taylor* (1859), 1 F. & F. 511), is irreconcilable with Blackburn, J's. view unless East's suggestion be accepted (*supra*, p. 29), viz. that a threat to burn a house conveys a threat of personal danger to the occupiers.

[104] *Ibid.*, 297.

of the section appears in the passage quoted above in which it was explained that personal intimidation is essential.

In *R* v. *Bernhard*[105] the principle of *R* v. *Walton* was followed to the extent that the existence of a *bona fide* claim of right was held to be sufficient to prevent guilt from attaching to the demand: this sound reason for the decision becomes still more obvious if we recall that a claim of right is also a defence to a charge of assault with intent to rob,[106] to one of robbery by means of an assault,[107] and even to a charge of robbery by means of actual battery.[108] But according to the principle of *R* v. *Walton*, *R* v. *Bernhard* could equally well have been decided on the ground that the menaces used (threats by the accused, the prosecutor's mistress, to reveal their relations to his wife) were not sufficiently intimidating for the purposes of the completed offence of larceny.

The next case on the subject after *R* v. *Walton*, *R* v. *Robertson*,[109] is an example of menaces which amount to personal intimidation. It was held that a threat by a police constable to take a man to prison upon a fictitious charge was a menace within the meaning of the Larceny Act. A similar threat had been held insufficient for the crime of robbery,[110] but there was a sufficient degree of personal intimidation in *R* v. *Robertson* for the purposes of the offence of larceny by intimidation.

It was not until 1914 in *R* v. *Boyle*[111] that the word menaces was allowed to bear its now familiar wide meaning. The appellants made threats to the chairman of a company that attacks upon the company would be published in a newspaper, which would have the effect of reducing the market price of the shares, and they demanded a sum of money as the price of refraining from such attacks. It seems a clear case for a prosecution for the offence under section 31 (2), then defined in the Libel Act, 1843, and it is unfortunate that counsel for the appellants did not point out that there was an alternative charge: they did, however, argue from the restricted meaning of menaces in the Georgian statutes. This argument was rejected. Lord Reading, C.J., read the written judgment of the Court of Criminal Appeal: "We do not think that the meaning of the word 'menaces' in the section is so restricted. Whatever may have been the view in earlier days under the older statutes and decisions a wider

[105] 1938, 2 K.B. 264, Ct.C.A.
[106] *R* v. *Boden* (1844), 1 C. & K., 395.
[107] *R* v. *Hall* (1828), 3 C. & P. 409.
[108] *R* v. *Hemmings* (1864), 4 F. & F. 50.
[109] (1864) 4 Le. & Ca. 483, C.C.R.
[110] *R* v. *Knewland* (1796), 2 Leach 721; *supra*, p. 29.
[111] 1914, 3 K.B. 339, Ct.C.A. (Lord Reading, C.J., Lord Coleridge and Sankey, JJ.).

meaning has been given to the word by later decisions beginning with *R* v. *Walton*, decided by a very strong Court more than fifty years ago."[112] But apart from *R* v. *Walton* the only other decision the Court could refer to was *R* v. *Tomlinson*,[113] and that case is concerned with the other section which contains the word, section 29, in which the absence of the qualifying words "with intent to steal" makes the broader interpretation easier. In *R* v. *Boyle* the Court quoted the passage from *R* v. *Walton*, to be found above, in which it is pointed out that nothing is said in the section about violence to person or property in conjunction with menaces, but the Court omitted to notice the other passage, also quoted above, in which the Court for Crown Cases Reserved held that the threat must amount to intimidation sufficient to take away consent: it is clear from the passage which was not quoted in *R* v. *Boyle* that intimidation, in the earlier case, was understood to mean physical intimidation. The judgment in *R* v. *Walton*, taken as a whole, has a very different sense from that read into it in *R* v. *Boyle*. In *R* v. *Boyle* the Court did not appreciate the significance of the qualification "with intent to steal." Surely they would not have said that the appellants had "stolen" the sum of money which they had succeeded in obtaining on a former occasion by means of the same threats to publish the attacks on the company. They agree that "if the threat is of such a character that it is not calculated to deprive any person of reasonably sound and ordinarily firm mind of the free and voluntary action of his mind it would not be a menace within the meaning of the section."[114] The judges who decided *R* v. *Walton* in accordance with the common law would have agreed with this general statement, but would have added that the consent of the person described could not be overcome except by something in the nature of personal intimidation.[115]

A practical consideration underlying the judgment in *R* v. *Boyle*[116] was expressed in the following words: "The degree of fear or alarm which a threat may be calculated to produce upon

[112] *Ibid.*, 343.
[113] (1895), 1 Q.B. 706, *supra*, p. 37.
[114] *Ibid.*, 345.
[115] "To intimidate" under the Conspiracy and Protection of Property Act, 1875, s. 7, was given the meaning of a threat of personal violence (*Curran* v. *Treleaven*, (1891), 2 Q.B. 545: Atkin, L.J., in *Ware & De Freville, Ltd.* v. *Motor Trade Association*, 1921, 3 K.B. 40, C.A., p. 82), and it required a statutory change for "to intimidate" to mean "to cause in the mind of a person a reasonable apprehension of injury to him or to any member of his family or to any of his dependents or of violence or damage to any person or property," the expression "injury" including "injury to a person in respect of his business, occupation, employment or other source of income and any actionable wrong": Trade Disputes & Trade Unions Act, 1927, s. 3 (2) and (3).
[116] 1914, 3 K.B., p. 344.

the mind of the person on whom it is intended to operate may vary in different cases and in different circumstances. A threat to injure a man's property may be more serious to him and have greater effect upon his mind than a threat of physical violence." This may be true but the difficulty of examining the strength of the party's power of resistance would have been avoided if the charge brought had been that of the offence now defined in section 31, re-enacting section 3 of the Libel Act, 1843: "intent to extort" does not imply an overcoming of consent in the same way as do words which introduce the conception of larceny. One may sympathise with the hope of Peterson, J.[117]: "Freewill has been much discussed in the region of metaphysics, and lawyers might be content that the discussion should not extend to the realm of law." The conceptions of consent and freewill are not obstacles in the way of punishing blackmailers under section 31 though these conceptions are relevant under section 30 in which the definition implies that the larcenous menaces must be such as can overcome "the consent of the owner." At the same time, the common law has, in the rules of robbery and larceny by intimidation, fairly definite answers to the question, What is sufficient to cause a taking of property under threats to be a taking without the consent of the owner? The decision in *R* v. *Boyle*, in breaking away from the common law restrictions, has made the law more uncertain and, it is submitted, unnecessarily uncertain in view of the width of section 31 in respect of blackmail.

How far has the principle of *R* v. *Boyle* been extended beyond the fear for the value of intangible property which was present in that case? In the following year Lord Reading, C.J., again delivered the judgment of the Court of Criminal Appeal,[118] this time to the effect that that which amounted to a threat to accuse of crime was a "menace" within the meaning of section 30: their lordships ignored the consideration that as the crime in question (trading with the enemy) was punishable with seven years' penal servitude the prisoner could have been charged and convicted under section 29 (1) (iii).[119] Nor, on this occasion, was any consideration given to the meaning of "with intent to steal." In *R* v. *Bernhard*[120] it was assumed without question that the prosecutor's fear that his former mistress would reveal their relationship to his wife was sufficient.

It is, then, submitted that the offence now defined in section 30

[117] *Hodges* v. *Webb*, 1920, 2 Ch. 70, 86.
[118] *R* v. *Studer*, 11 Cr. App. R. 307; 85 L.J.K.B. 1017.
[119] Or under s. 31 (2) if, on the facts, he could not have been said to threaten "to accuse."
[120] 1938, 2 K.B. 264.

of the Larceny Act, 1916, was originally intended to be an appendage to the law of larceny covering certain kinds of attempted robbery and larceny. This original intention is reflected in the words of the section which, besides requiring an intent to steal, provides that the property demanded must be "capable of being stolen." The three last-mentioned decisions of the Court of Criminal Appeal are, as a matter of logic, in conflict with the terms of the statute. Professor Campbell is right in thinking that the explanation of the bewildering variety of wording in the "blackmail" sections of the Larceny Act is "purely historical,"[121] but the anomalies were brought about by such recent history as *R* v. *Tomlinson* in 1895 and *R* v. *Boyle* in 1914. Section 30 is, in his words, "anomalous and productive of contradictions in the modern law." This is so because the earlier history of the provision not having been appreciated, it has been stretched by judicial decisions beyond its proper compass so as to cover blackmailing conduct which the provision in section 31 only was originally designed to punish.

Threats to Publish Any Matter with Intent to Extort: Section 31 (2)

It was provided by the Libel Act, 1843, section 3, the immediate predecessor of this section, that nothing therein contained was to affect the law then in force relating to threatening letters. Thus the more serious kinds of blackmail continued to be punishable with heavy sentences, while the threats which were made criminal for the first time in 1843 carried a lighter sentence. Section 31 (2) is much wider in scope than the two preceding sections in the Larceny Act, 1916. The only evil which need be threatened is the printing or publishing of "any matter." As successful extortion under the section need not amount to stealing there is no necessity for the transfer of the valuable thing to be demanded immediately on the threat being made: it makes no difference if the blackmailer requires the property to be handed over at a future date. And the "valuable thing" need not be capable of being stolen. There is no need to prove any specifically defined type of consequences which is undesired by the prosecutor. The essence of the offence is the "intent to extort." This is brought out in the judgment of the Court of Criminal Appeal in *R* v. *Wyatt*[122] in which it was argued that "in order to constitute an offence against the statute it must be shown that the appellant made such a threat as would affect the mind of a reason-

[121] *Op. cit.*, 55 L.Q.R. 384, n. 6.
[122] (1922), 16 Cr. App. R. 57, 59, 60; 91 L.J.K.B. 402, 403.

able man and deprive him of his free volition and cases such as *R* v. *Tomlinson* and *R* v. *Boyle* were cited." The Court thought they had "no bearing upon the case": "The nature of the threat required to constitute an offence against section 31 . . . is stated in the section itself. Under subsection (1) it is a threat to publish any libel, and under subsection (2) a threat to publish any matter. The word 'threaten' in this section is equivalent to 'expresses an intention' or 'says that he will'."

It is impossible to imagine that the words "with intent to extort" were at any time meant to imply that successful blackmail under this section must amount to private extortion at common law. There is little evidence beyond Lord Holt's ruling in *R* v. *Woodward*[123] that there is such an offence and such a stultification of the section has never been suggested and the decisions on the section are inconsistent with it. The interpretation of the words is restricted by no decisions previous to 1843 and by very few since that date. It would therefore be of practical value to submit the words of section 31 to an analysis which is purely jurisprudential.

It has been thought[124] that other branches of the criminal law which were consolidated in the last century may "on systematic analysis prove to contain as many inconsistencies and to stand no less in need of revision" than the law of blackmail. This is unlikely for it would appear that in no other branch of the statutory law of crime has case law given such an unforeseen interpretation to logical statutory provisions. Professor Campbell asks: "Is there not a case for the systematic codification of the whole law relating to blackmail?" In the present state of the law there is such a case. One satisfactory method of codification might be to annul the judicial interpretations put upon the codifying sections as they now stand.

W. H. D. WINDER.

[123] (1707), 11 Mod. 137; *supra*, p. 30.
[124] Campbell, *op. cit.*, 399.

The "blackmail" sections of the Larceny Act, 1916 (6 & 7 G. 5 c. 50) read as follows—

S. 29. (1) Every person who—

(i) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing;

(ii) utters, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person (whether living or dead) of any

crime to which this section applies, with intent to extort or gain thereby any property or valuable thing from any person;

(iii) with intent to extort or gain any property or valuable thing from any person accuses or threatens to accuse either that person or any other person (whether living or dead) of any such crime;

shall be guilty of felony, and on conviction thereof liable to penal servitude for life, and, if a male under the age of sixteen years, to be once privately whipped in addition to any other punishment to which he may by law be liable.

(2) Every person who with intent to defraud or injure any other person—

(*a*) by any unlawful violence to or restraint of the person of another, or

(*b*) by accusing or threatening to accuse any person (whether living or dead) of any such crime or of any felony,

compels or induces any person to execute, make, accept, endorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix the name of any person, company, firm or co-partnership, or the seal of any body corporate, company or society upon or to any paper or parchment in order that it may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of felony and on conviction thereof liable to penal servitude for life.

(3) This section applies to any crime punishable with death, or penal servitude for not less than seven years, or to any assault with intent to commit any rape, or any attempt to commit any rape, or any solicitation, persuasion, promise, or threat offered or made to any person, whereby to move or induce such person to commit or permit the abominable crime of buggery, either with mankind or with any animal.

(4) For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person.

S. 30. Every person who with menaces or by force demands of any person anything capable of being stolen with intent to steal the same shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding five years.

S. 31. Every person who with intent—

(*a*) to extort any valuable thing from any person, or

(*b*) to induce any person to confer or procure for any person any appointment or office of profit or trust,

(1) publishes or threatens to publish any libel upon any other person (whether living or dead); or

(2) directly or indirectly threatens to print or publish, or directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or thing touching any other person (whether living or dead);

shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment, with or without hard labour, for any term not exceeding two years.

THE STATUS OF REFUGEES

MR. E. J. COHN'S article on "Legal Aspects of Internment" (4 *M.L.R.* 200) has filled a gap in the discussion on a problem, involving a variety of non-legal considerations, not always compatible with each other. For that reason alone the notes deserve the praise of all who want to approach the question with impartiality.

The general aim of the Geneva Convention concerning the Status of Refugees from Germany may perhaps be described as to confer upon refugees a special status and to accord to them most favourable treatment accorded to nationals of a foreign country, excluding thereby any special treatment not directed against all aliens alike. It should be noted, however, that apart from the reservation mentioned by Mr. Cohn as to Art. 5 the British Government have made a general reservation restricting the application of the Convention to such refugees coming from Germany who "at the date of ratification (Sept. 26th, 1938) no longer enjoyed protection of the German Government." The vast majority of the refugees, however, arrived only after that date in consequence of the pogroms following the assassination in Paris of the German Diplomatist von Rath in November, 1938.

The convention being an international treaty between States, it is further doubtful how far it can be relied on by the individuals concerned as distinguished from the contracting Governments. These considerations limit the practical importance of the Convention to such an extent that it seems appropriate to discuss that power of the Executive more in detail, which in fact and expressly has been made the basis for the mass internment, namely, the Royal Prerogative.

As stated by Mr. Cohn, it can scarcely be doubted that the Home Secretary may deal with enemy aliens in accordance with his free discretion, and it is settled law now that once an enemy alien is lawfully interned he is as to his remedies in no better position than a prisoner of war (cf. the cases cited on page 202 and *R.* v. *Knockaloe Camp Commandant, ex parte* Forman. 87, L.J., K.B. 43). On the other hand it is clear that, if for one reason or other, it can be shown that the person detained is not in law an "enemy" alien, an order for internment based on the Prerogative and not on a special statutory power is illegal and could, therefore, be successfully challenged in a Court of Justice.

The problem of the general internment of refugees turns, therefore, primarily round the question whether or not they are "enemy" aliens in law; that most of them are friendly in fact is generally recognised.

An "enemy alien" usually is defined as a "subject of a state at war with His Majesty," although e.g. for the purpose of the "Trading with the Enemy Act," the test is territorial and not national. Yet, it is submitted, even in the wider sense of the word the test of nationality is not always decisive; in other words, there may be persons who are enemy subjects and still are not "enemy aliens."

The problem of refugees is commonly thought to be a new one, but it has arisen before, even with regard to the special question under discussion, in the case of the French Huguenots. Were these refugees during the Anglo-French War after the revocation of the Edict of Nantes treated as "friendly" or "enemy" aliens? In the case of *Wells* v. *Williams* (1 Lord Raymond, 282) we find in this respect the following noteworthy remark:

"The King may declare war against one part of the subjects of a Prince and may exempt the other. And so he has done in his war with France, for he has excepted in his declaration of war with France all the French Protestants." Accordingly it was held that the refugee plaintiff was not barred from bringing an action in the English Courts by reason of being an enemy alien. The statement that the King may declare war against part only of the subjects of a foreign power is wide enough, however, to be of a more general application, at least in municipal English Law even though in International Law as between the States concerned the distinction nowadays may not be practical.

In this connection the setting up of Tribunals for the classification of enemy subjects, in particular the classification of all those persons who were found to be genuine refugees as "victims of Nazi oppression" appears in a new light. It is submitted that this classification in connection with authoritative statements to the effect that the aim of this country is to fight Hitler and Hitlerism, amounts in fact to an exemption from the ordinary effects of declaration of war with regard to all those who were found to be "victims of Nazi Oppression." Significantly they are mostly called "friendly aliens," even if interned, although when at large they only are treated as "enemy" aliens temporarily exempted from the special restrictions otherwise applicable to their class. Should not instead, on the authority of the precedent set up in the case of the Huguenots, the "victims" have been treated as friendly aliens *de facto* and *de jure*, notwithstanding their German nationality, if any? If so, they could not be interned merely for the reason of being "enemy" aliens and any other restrictions directed against enemy aliens as such simply were not affecting the "victims."

This argument naturally applies with even greater force to those who have been deprived of their nationality or are for other reasons stateless. In view of the many cases brought before the Courts during the last war when the question of loss of German nationality and its bearing on the legality of internment has been submitted to a judicial review, it is surprising that not a single case has been reported now. It is obvious that the nature of compulsory expatriation is quite different from the loss of nationality by residence abroad, which was the chief reason for an alleged loss of German nationality at the time of the last war.

How far German refugees by the mere fact of emigration do lose their nationality is questionable. The German authorities undoubtedly still regard them as subjects as far as *duties* are concerned, though not by giving protection or in other respects. One of the principal incidents of nationality is the right to re-enter the Home country; this right, even in peace time, has been denied to all German emigrants (refugees), Jewish and non-Jewish alike; in many cases not even a passport has been granted to them, one of the main reasons for the Geneva Convention.

It might well be argued, therefore, that under such conditions a claim by the German Government that these people still are German subjects is illegal and not in accordance with International Law: another argument tending to show that refugees should be accorded the legal status of friendly aliens and not that of enemies, and, therefore, not subject to discretionary internment on no other basis than that they are enemy "subjects" or "nationals."

It cannot be denied, of course, that even among those who are or purport to be refugees are some who in fact do not deserve the confidence

of the Executive, and it is clear that the State simply cannot take the risk of not controlling these elements. Indeed this consideration has been called by Younger, J., in the case of *Schaffenius* v. *Goldberg*,[1] "the only justification" for interning civilians. At the time of that judgment, however, the Executive had not the wide powers they have today under section 18B of the Defence regulations, a regulation even applicable against British subjects.

The chief difference between these powers and the Prerogative Powers is the fact that in the former case a *particular* case has to be made out against an *individual* person, while under the Prerogative no reasons need be given beyond the fact that the internee technically is an enemy alien, meaning under the prevailing praxis that he is the holder of a German passport or not even so much. Yet even the Defence Regulations leave the Executive wide powers of discretion. In *Re Lees*[2] it has been held in effect that the discretion of the Secretary of State is not subject to judicial control provided the "Home Secretary had reasonable cause for the belief expressed in the order."

There must be some special reason, however, and at least the internee can appeal to an advisory committee. It is submitted therefore, that there are ample legal powers vested in the Executive to safeguard the security of this country which is the paramount consideration without having to rely on the law of enemy aliens with regard to persons who neither deserve that stigma in fact nor, as it has been tried to show, in law.

H. J. Feist.

[1] [1916], 1 K.B. 287.
[2] (1940) 57 T.L.R. 26.

STATUTES

The War Damage Act, 1941

The city arose as a specially protected environment within whose safe confines culture, industry, and civilization could develop. It is a particularly ironic turn of history that this environment should have become the one most vulnerable to the disintegrating effects of modern warfare. The bomber has created the unprecedented necessity for the entire system of civic relations to continue its daily functions amid the continual destruction and threat of destruction of its materials, lives and property.

Insofar as law adjusts and controls these relations it is goaded into activity. It was inevitable that stacks of statutes and reams of regulations should accompany each new manifestation of destruction. Perhaps it was equally inevitable that this new law should be most inadequate where the need was most urgent. Law, which founds itself on precedent, and, more than any other science, inhibits its ability to meet new situations by the strictness with which it limits itself to the employment of existing historically defined sources and concepts, must always miss the point of revolutionary situations, even where it is profuse to the point of exhaustion in dealing with them. There is the constant danger that a new problem will not be met, but be given only the specious appearance of solution, by surrounding it with traditional and comforting words. The existing legislative scheme to meet the emergency so urgently raised by war damage, both to life and property, has done little more than hide the scars with a bandage. Crucial social problems have been subjected to administrative first-aid treatment, and laws, which, in their reliance on the major premises of juridical 'normalcy' are nothing less than irrelevant in the circumstances.

The most recent and the largest addition to this scheme, the War Damage Act, 1941, only confirms it in this aspect. It is not possible here to consider even a fraction of the vast number of legal problems that will arise from this Act, many of which will only precipitate themselves clearly in its practical administration in succeeding years. Its relations to existing war damage law is a problem of more immediate practical urgency, and a codification of the measures in this series, made now, would play a creative part by dissolving the inconsistencies inevitable to an interrelated group of *ad hoc* emergency measures. From this point of view, indeed, the Act is something of an achievement. Conceived out of necessity and born in haste, its 102 sections and five schedules are, with few exceptions,[1] well drafted, and free from inner inconsistencies. This is particularly commendable in view of the lack of general discussion that would normally precede and accompany a bill of comparable importance in peace time (though the pressure groups were active, and the authentic peace-time flavour was imparted by the advertisers and bill-posting associations getting their way (s. 19) while local authorities had many reasonable demands refused). The gap was partially filled by the sustained and informed criticism of a representative body of members throughout the passage of the bill

[1] S. 25 (8) (*d*) is not clear until it is realised that it operates by way of addition to a definition, not as a definition. S. 37 (1) and the Third and Fourth Schedules are not models of lucidity. A more serious blemish is the way in which definitions are scattered broadcast throughout the Act, and those which are collected, placed at the end, so that its first perusal is a painful affair of inter-depending suspended judgments. An earlier practice of putting all definitions at the front of the measure had much to commend it.

through the House of Commons and the adoption by the Government of an attitude of considered and conciliatory co-operation.

Part I of the Act is the longest, dealing with what it calls, with something of an inherent contradiction, "Buildings and Other Immovable Property." The new body set up by Section 1, the War Damage Commission, which is to be found wielding vital quasi-judicial powers in every corner of this first part of the Act, deserves separate treatment at a later stage in this note. The Act continues by formulating two schemes, one relating to payments (ss. 2–17), and the other to contributions (ss. 18–36), connected with each other only by tenuous links.

Payments. These are of two kinds. A payment of "cost of works" is for the cost, reasonable at the time of the execution of the works, of reinstating the land in the form in which it existed immediately before the occurrence of the damage. A "value payment" is equal to the amount of depreciation caused to the land by war damage, being the difference between the value of the land in its damaged state and the value of the fee-simple in open market on March 31st, 1939. In both cases there are provisions for deductions in the event of failure to minimise damage, and to allow for material rendered available through the damage. In the case of "developed hereditaments," i.e. buildings and land attached thereto, the cost of works payment is to be made, except when there has been total loss, when a value payment is appropriate. Total loss is deemed to exist when the cost of reinstatement will be more than the difference between the value of the land in its reinstated form and the value it would have as a site, without making good the damage. In the case of "undeveloped hereditaments," a value payment is to be made, except where a cost of works payment would be less. In addition to either of these payments, which are alternative, a "temporary works payment" in respect of works reasonably executed for temporarily meeting the circumstances created by the damage, may be made. Temporary works will be executed as soon as possible after the damage and the appropriate payment made on completion. Reinstatement will take place at a time determined by public considerations and the appropriate cost of works payment made on completion. Value payments are to be made at a time to be hereafter specified in Treasury Regulations and will normally be paid after the war. Until payment, interest at 2½ per cent. per annum accrues on value payments. Where a person who will be entitled to a payment stands in immediate need of funds to secure housing accommodation for himself or his family, or in order to carry on his business, sums on account of his ultimate payment may be paid over up to a limit of £800 for each purpose. A cost of works or temporary works payment is to be made to the persons who incur the costs of the work executed. A value payment is to be made to the fee simple owner, if his is the only proprietary interest, or else apportioned among the proprietary interests, in proportion to the depreciations of the various interests. A proprietary interest means the fee simple or a tenancy for seven years or more. The depreciations on these interests are calculated in the same manner as is the depreciation on the land as a whole, which determines the sum available for apportionment. Where an interest was mortgaged before the damage and the mortgage subsists at the time of the value payment, the payment, together with accrued interest, is to be paid to the mortgagee, and is to be held by him as if it were the proceeds of the exercise of a power of sale under the mortgage. In order to prevent speculation and the abuse of the immediate

cash needs of a bombed-out person, there are restrictions on the power to assign rights to payment. Claims for under £5 are not to be entertained, though there is provision for the aggregation of successive minor damage to the same land.

These are the bare bones of the payment scheme. They are bare because they have been presented deliberately stripped of the conglomeration of discretions given to the Commission at every point, and which might confuse the undiscriminating into the belief that there is life in these provisions. Discretions are of value when the choice lies between cogent alternatives; and though so wide a discretion must have some tangible results, the general impression given is that of the mime who fruitlessly endeavours to conceal his own appearance by altering the shape of his hat.

The defence put up for the difference between the cost of works and the value payment is that while it is in the national interest for a partially destroyed house to be repaired, to reinstate a house which is a total loss would be to give a new article for an old one, ignoring the factor of depreciation before damage. Hence, in this latter case, only a money payment should be made, and this must be calculated on the basis of pre-war value. This means that while it is in the national interest for Smith, who has his house partially destroyed, to have it repaired, it is wrong for Jones next door, who has felt the full weight of the missile, to have his house restored. In his case the national interest demands that he be content with the promise of payment, in an unspecified future, of a sum of money, calculated on a basis of value that will probably never exist again, and which will almost certainly be inadequate to replace his house at inflated post-war prices. It is true that Section 14 enables the Commission, after the war, to report that in view of changed circumstances, value payments should be increased, and that the Treasury may then act by regulations on this recommendation. This is one example of those vague discretions from which only the most sanguine can draw comfort. In most cases, the true effect of these provisions will be that the man who suffers most will receive least. This will be the effect not only as between persons on the same level of life, but as between large and small property owners. It is the small dwelling house which is totally destroyed far more frequently than the large block of flats or business premises. The same disparity arises in relation to non-payment of sums less than £5. The entertainment of such claims, it was truly said, would entail an onerous administrative burden. On the other hand, there exists in Section 2 an innocuous sounding discretion that will almost certainly work inequality in this connection. The Commission is to deal with land, for the purposes of payment, in such units as it determines, called "hereditaments." The provision was inserted on the grounds of administrative expediency. Where, for example, several neighbouring properties in the same ownership are damaged, the Commission will be able to deal conveniently with them as one unit. Obviously, however, this power passes well beyond the scope of mere administration. If several properties in the same ownership have each suffered minor damage, to treat them as one unit will mean that a cost of works payment will be recoverable in respect of the whole damage, which will amount, as for the unit, to more than £5. The individual small owner must wait for another bomb to fall in his street. There seems a more serious possibility that the aggregation of properties into the hereditament may be manipulated to obtain the cost of works payment for one element in the

unit, which, if it had been in separate ownership, would have been eligible for a value payment only.

The most serious defect of all, the treatment of mortgaged property, can only be properly appreciated when the contribution provisions have been summarized.

Contributions. These are levied on the net annual value of property, being the net Schedule A assessment where one exists, and otherwise the valuation for rating purposes. Advertisement hoardings, tidal fisheries and rent-charges are excepted from contribution. Contributory properties will pay, in five annual instalments, commencing in 1941, 2s. in the £ on such value, with certain exceptions including agricultural land, open-air sports grounds, and incorporeal rights, where the contribution is only 6d. in the £. It has been estimated that the amount of contributions so paid will total 200 millions. Collection is in the hands of the Commissioners of Inland Revenue.[2] No special war damage fund has been constituted, and contributions will go to the general exchequer account.[3] The Government has indicated that it is prepared to add another 200 millions to the sum raised. These amounts are based on provisional estimates, and their sufficiency depends on factors still intangible. Hence, they can only be treated as provisional, and Section 22 lays down procedure for the increase or reduction of contribution from time to time, by Treasury regulations in the case of increase, by Parliament in the case of reduction. The Act fixes on one person, called the direct contributor, as primarily liable to pay instalments of contribution. Where there is only one proprietary interest (*as defined above*) the owner is liable; where there is more than one, the owner of that interest which carries the right to possession of the whole property is liable. To determine ultimate liability between landlords and tenants, the Fourth Schedule contains a table which shares out the liability of the direct contributor among other propietary owners according to two factors: the length the term has still to run and the proportion between the rent and the value of the property.[4] A person who has to pay an indemnity under these provisions is called an indirect contributor. Section 25 then continues to make important rules for certain cases where the interest of a contributor, direct or indirect, is mortgaged. If (i) the amount of the mortgage is at least one-third of the price of acquisition of the interest mortgaged; (ii) the property is residential or agricultural; (iii) its value for the purposes of contribution is less than £150 in the first case and £500 in the second; and (iv) the mortgage was created to secure

[2] Procedure for the collection of contribution has been made in S.R. & O. No. 845, 1941.

[3] Similarly, payments will be made from moneys provided by Parliament. Though the history of the Road Fund shows that no impregnability attaches to a special account, such an account would have enabled the public to appreciate better what was being done with its contributions; and its absence lends support to the view that this is first a taxing and only afterwards an insurance Act. The Air Raid Insurance of 1915–1918 provides an interesting comparison. There, the Government received as nett premiums £14,086,615. The amount paid to claimants was £3,046,790. The balance remained with the Treasury. (Hansard, Vol. 159, 3204.)

[4] It is not easy to make the involved indemnity provisions clear in a short form. For a lucid explanation reference may be made to *The War Damage Act*, 1941, by G. Granville Slack. Unlike many annotated versions of emergency legislation which have appeared, the notes in this book are not mere summaries, less accurate and more obscure, than the provisions they are alleged to explain, but of real utility. An excellent index and tables are particularly valuable in a long Act containing many cross-references and scattered definitions.

a capital sum on the occasion of and in connection with the acquisition of the interest mortgaged or the construction or improvement of the contributory property (which in the vast majority of cases means a building society transaction) certain rights over against the mortgagee are created, the mortgagor being entitled to an indemnity from the mortgagee depending on the extent to which the interest is mortgaged. Tenants or mortgagors entitled to indemnity under the Fourth Schedule or Section 25 may deduct these indemnities from rent or mortgage payments. None of the provisions relating to rights of indemnity may be contracted out of.

Although the refinements of the scheme have had to be omitted, enough of the main structure has been outlined to bring into relief the contrast between the bold, deep lines of the contributions scheme, and the hazy chiaroscuro of the payments scheme. This Act has been referred to as an insurance Act, and the impression in the minds of the public is that it is designed to alleviate hardship. Both are mistakes. The centre of gravity of this Act lies in contribution, not compensation. There will be too many cases where, like substance and spirit, the transubstantiation will be a symbolic event of rare occurrence.

It is the position of the mortgagor under this Act which provides the main justification of the critical attitude here adopted. Since 1919, under an economic trend encouraged by governmental policy, an enormous number of dwelling-houses have been acquired by owner-occupiers on mortgage. There are now in existence about $1\frac{3}{4}$ million mortgages with building societies, and $2\frac{1}{4}$ million with insurance companies, banks, and private individuals. The point of view from which this Act begins to contemplate the problems raised by war damage to mortgaged property is that of the traditional legal theory underlying a mortgage transaction, a theory which is discrepant to the social content of the majority of peace-time mortgages, let alone the war emergency for which the Act is supposed to provide. The mortgagor is the owner of the equity in the house, normally in possession, and liable on a personal covenant to the mortgagee for which the house is security. Hence, he is the person who ought to pay contribution, and this ought strictly to apply to every case. A concession is made, however, in the case of building society mortgages (mortgages created to secure a capital sum on the acquisition of the interest). The ordinary mortgagor in such a case, unhappily unaware of the history of equity, tends to regard his relationship with his mortgagee as one approximating to landlord and tenant, and his mortgage instalments as rent. To meet this prejudice, the mortgagee, in such cases, will be asked to give a partial indemnity, but not where the amount secured is less than a third of the purchase price, or the annual value of the property is more than the sums already indicated. As to payment, "if there is a value payment it goes to the mortgagee in extinction of the mortgage debt, any balance being handed over to the owner of the equity, if there is a balance. All I want to say about that is that is, of course, the normal principle of our law."[5] Now everybody knows that the real content of a building society transaction normally bears no relation whatsoever to the legal principles in which it is expressed. The wage-earner who is investing his savings in the purchase of a house on a building society mortgage is normally no more

[5] Hansard, Vol. 367, 1205–6, in a speech by the Attorney-General. Reference to any of the speeches made by the Attorney-General or the Chancellor of the Exchequer on this topic will show that the characterization made of the Government view is not based on the isolated context quoted.

really concerned with his debt than the mortgagee is with the mortgage. When such a mortgagor has lost his house, he has lost everything, and to suggest that he gains by the discharge of his personal covenant on payment of a value payment to the mortgagee is to deal with fictions, not fact. As one member put it, you cannot get blood out of a stone. Passing by the anomalous differentiation whereby one class of mortgagees is exempt altogether from contribution, to consider from the payment aspect one typical example of the situation in which many mortgagors will find themselves under this Act, we find that a man who has paid off, say, as much as a third of his mortgage debt, and whose house is then destroyed, will be entitled, after the war, to what remains of a value payment on this house (calculated on a pre-war valuation), after the deduction of the remainder of his debt. In many cases, this will represent a negative sum. Meanwhile, he remains liable for interest at anything from 3–5½ per cent., while interest on his ultimate payment accrues at 2½ per cent. As this Act stands, that is to say, such a mortgagor may find himself still owing money to the building society, without his house, and left to draw comfort from the fact that his personal covenant, which never existed for either party as anything but a legal technicality, is partially discharged.

If any legal principle is suitable of application, it is that of frustration. Neither party contemplated the destruction of the property by aerial bombardment when the mortgage was made. The only real comfort to be drawn from these results is that they are so unjust that they will hardly be able to work in practice. Every consideration unites in raising the principle that the equitable apportionment of both contribution and payment between mortgagors and mortgagees is necessary to attain a just distribution of unprecedented burdens.

The later sections of Part I make provision for special classes of land. Public utility undertakings will be dealt with in a separate Act and highways by a Treasury scheme. Land belonging to foreign states and sovereigns is not liable for contribution, but receives payments. Air-raid shelters, National Trust Land, requisitioned land and land held for charitable or ecclesiastical purposes are also specially provided for. In the last case payment is within the discretion of the Commission, and contributions not payable, except in the case of educational charities, which pay one-third.

Public Law Aspects. The administrative lawyer will find much to merit his interest in this Act. The special needs of local authorities, despite strenuous championing by Sir J. Lamb, have received scant attention, and apart from the duty of consultation with them in the administration of the "public interest" section, (*see below*) they are mentioned in the Act only in connection with property peculiarly within their province, such as air-raid shelters. Apart from these special cases, local authorities are entitled and liable in exactly the same manner as the ordinary individual. This general rule will not always be easy to apply, since terms which fit the activities of the ordinary individual or business may not be quite appropriate when applied to some of the activities of a local authority. On these points, authorities will have to await guidance.

It is the functions of the Treasury and War Damage Commission that need closest attention under this heading. The provisions relating to these functions and to the relations between these two bodies are an excellent example of the use, variety, and scope, of modern administrative techniques of departmental legislation, and will provide much grist to the mills of both schools of thought on this matter, both the "new despotists"

and the progressives. General supervision is in the hands of the Treasury. Under Section 1 it has power to set up the Commission[6] which is to exercise its functions, including discretionary functions, in accordance with Treasury regulations, these regulations to be of a general character and not to require the Commission to exercise any of its functions in a manner inconsistent with the provisions of the Act. The original proposal was for the Treasury to make directions to control the Commission, and the amendment which, after a good deal of agitation, secured the alteration, must be counted one of the most important made. It would have been highly unsatisfactory had the important functions of the Commission been performed under unpublished directions. Presumably it was the anxieties of members on this score which produced the proviso, which does not seem helpful. To say that regulations must be "general" raises a most obscure point of interpretation, and to say that they must be *intra vires* is nothing but an excess of caution.

Functions may be instructively examined by classification according to the type of rule under which they are exercised. The following list is not exhaustive. In some cases the exercise of functions by the Commission is said expressly to be under Treasury rules, in others there is no such special mention, but the Treasury can still make rules under its general power in s. 1.

(i) Regulations. Wherever a power to make regulations is given by the Act, the regulations made must be laid on the table, and may be annulled by either House within twenty-eight days. The Rules Publication Act, 1893, does not apply. Regulations may be made to specify the time limits within which notification of damage and claims for payment must be made, and the particulars to be given on such notification, the Commission retaining a discretion to waive time limits.[7] Where property is of such a nature that its market value is not readily ascertainable, and the ordinary principle of evaluation for the value payment is therefore not easy to apply, the value may be determined by reference to such matters as the Treasury may specify by regulations. Regulations are to determine the value of materials made available, which is to be deducted from payment.[8] The time when value payments are to be made is to be laid down in regulations.

(ii) Orders. These depend for validity on express approval by a Commons' resolution. There are three cases where an order is required under the Act; to increase the amount of value payments on the Commission's report as to altered circumstances; to increase contributions; and for the highways scheme.

(iii) Directions. In respect of many important matters, the Treasury may act simply by departmental circular. The case of widest interest is s. 7, containing provisions for securing the public interest in the making of payments. Sub-s. (1) reads: "The Treasury shall give directions to

[6] The Commission, the constitution of which is determined by the First Schedule, has been set up. It consists of seven members under the chairmanship of Mr. Trustram Eve, and although there is no provision for the representation of special interests as such, the members have been chosen on a basis of familiarity with the problems that will arise, and include a trade union secretary, an insurance company manager, an accountant, a surveyor, a housing expert, and two members with special knowledge of Scottish affairs. It is hoped that a large proportion of the business transacted will be handled by local offices.

[7] Regulations have been issued in S.R. & O., No. 569, 1941.

[8] These matters (*inter alia*) have been dealt with in S.R. & O., No. 588, 1941.

be observed by the Commission for securing that the provisions of this Part of this Act relating to the making of payments in respect of war damage shall be executed in conformity with the public interest, as respects town and country planning, the provision of housing accommodation, the development of industries and services and of agriculture, the preservation of amenities, the consumption of supplies of building materials for the time being available, the building requirements of persons engaged in work of public importance, and such other matters as may be prescribed." The *ejusdem generis* rule ought to apply to the last few words. To implement these directions, the Commission, after giving prescribed notice, may impose conditions as to the nature of the works to be executed, or time of execution, etc.; on the right to receive a cost of works payment; or, if the directions imply that the particular damage need not be made good, give a value payment where a cost of works payment would have been appropriate. Without such notice, it may impose conditions on a value payment (e.g. that it be used to construct another building as specified); give a cost of works payment in lieu of a value payment; and make an addition to the cost of works payment in consideration of the omission of works that would otherwise be executed. Where a local authority would be affected in its functions, the Commission has a duty to allow it to make representations. This section is a step in the right direction, but it is difficult to assess its exact value. In such an important matter as national re-planning, it would have been well had provision been made for publicity to be given to the policies adopted, with appropriate safeguards on security matters. It also seems that a topic within the field of post-war reconstruction should properly fall to be considered by Mr. Greenwood or Lord Reith. The reason for Treasury control was stated to be that the Treasury would here act in its customary role of co-ordinating department, consulting the large variety of ministries interested. But what is needed is not a co-ordinating, but a creative policy, and that in the hands of a department with a spending outlook. It is obvious, in fact, that the great problem and opportunity of reconstruction will have to be approached, when the time comes, by means more direct than incidental provisions to a war damage measure.

(iv) In several matters, the Commission is given discretions without reference to any specific Treasury control. Thus, having regard to the effect of the damage on the value of another hereditament, it may give a cost of works payment where a value payment would have been appropriate. Where, after consultation with the parties interested, it considers that there is no wish for reinstatement, it may give a money payment instead of a cost of works payment, the amount being within its discretion, within the limits of what was the appropriate cost of works payment, or what would have been a value payment had it been appropriate. Assignments normally need the written consent of the Commission. Payments made to a charity are within its discretion. It may specify requirements for fair wages and conditions in contracts for the execution of works under the Act, and, no doubt, will use as a model terms usually inserted by the Government in its contracts for works.

Sanctioned powers of inspection of damaged premises, of obtaining information, and the production of documents, are given to the Commission for the implementing of its functions. On questions of valuation there is an appeal from the determination of the Commission to a referee. The determination of any questions arising as to the kind and amount of payment

is for the Commission, which may make rules of procedure. On questions of fact, the Commission is the final tribunal. On questions of law, there is an appeal to a High Court judge nominated by the Lord Chancellor. Rules of Court will be made to deal with these appeals.

Part II of the Act deals with the insurance of goods. Considerations of space, and of the lesser intrinsic discussion value of this part of the measure render it necessary to give it only passing notice. The sections rank with the boniest of the skeleton type, and most of the practical content and procedure of the scheme is to be found not in the Act, but in statutory orders[9]; the clauses of the standard insurance policies, and the directions prescribed by the Board of Trade, and made available to the public through the Press and the issue of explanatory memoranda by the insurance companies to their customers. "Goods" are defined to exclude, *inter alia*, money; negotiable instruments; evidences of title; documents owned for the purposes of a business; anything which falls within the definition of "land" under the Act ("land" includes any plant and machinery included with the premises for rating purposes); and commodities insurable under the War Risks Insurance Act, 1939 (roughly, the stock of a business). Hence, of the two schemes under Part II, the business scheme broadly covers movable plant and machinery, and office furniture and equipment, and the private chattels scheme, household furniture and personal effects. Insurance of business goods, is, with certain exceptions, compulsory. Insurance of private chattels is voluntary. Premiums are presently payable, but payment will normally be postponed till after the war, except where replacement of goods destroyed is expedient in the public interest, or, in the case of private chattels, payment is necessary to avoid undue hardship, or the claim is for not more than a small sum prescribed by order. Householders are covered against loss of private chattels although they have taken out no policy, up to £200, with increases for married men and for the case where there are children. The main operative control of these schemes is vested in the Board of Trade, though the Treasury will issue regulations on certain financial aspects, and the War Damage Commission is to exercise such functions as the Board of Trade, with the approval of the Treasury, may direct. Losses incurred before the coming into effect of the schemes will be retrospectively covered.

A short criticism of these provisions is that although couched strongly in insurance terminology, they do not afford the degree of protection associated with the term "insurance." Payments are postponed to an indefinite date, and sums on account must await proof of national importance or hardship. The indications are that both "hardship" and free-cover payments under the private chattels scheme will be made on principles already evolved in the scheme in existence before the passing of the War Damage Act, for payments to replace loss of essential clothing and furniture by persons below specified income levels. Anyone who has had experience of this earlier scheme knows the Spartan austerity of the interpretation of "essential." On the other hand, while it is true that all the advantages of normal insurance could not properly have been expected, there seems no excuse for the limit of £1000 laid down by order below which the business scheme is voluntary, and the placing of the entire private chattels scheme on a voluntary basis. People in safer areas, lazy

[9] Orders made at the time of writing are: No. 450, 1941 (Business Scheme); No. 451, 1941 (Private Chattels Scheme); No. 500, 1941 (Mutual Insurance); No. 699, 1941 (Business Scheme); No. 787, 1941 (General Treasury Regulations).

people, people who can afford to lose their furniture, will certainly take advantage of the escape these provisions will afford them, with the result that a burden that should be shared communally will fall entirely on a section of the population, the premiums paid by that section, the bad risks, will be increased, and the poor man who genuinely cannot afford the premium, will be uncovered and forced to rely on the payments for "essentials" from the Assistance Board. To these objections, the defence made was that to include the smaller business man and all private chattel owners in a compulsory insurance would lead to insuperable administrative difficulties. There is substance in this argument, but where the alternative leads to the results indicated, administrative methods, involving the full use of existing insurance organization, might have been devised.

Part III of the Act makes certain amendments to the War Risks Insurance Act, 1939. Part IV contains miscellaneous provisions, which include definitions; a provision that contributions and premiums payable under the Act are capital payments and not to count for a deduction in computing income tax, N.D.C., or E.P.T., restrictions on mutual insurance; consequential amendments to certain emergency legislation; and sections providing for the application of the Act to Scotland and Northern Ireland.

When the Chancellor of the Exchequer broadcast on the War Damage Bill, he emphasised its function of supporting credit and economic security. Despite this frankness, the illusion has spread abroad that the prime effect of the Act is to relieve individual hardship. It has been the main object of this note to dispel this illusion. Even in regard to its proper objects, this Act can only be considered as a temporary, experimental, and tentative approximation to problems the implications of which are not yet fully realised. The Act recognises its own nature by limiting its life to expire in September, 1941, after which date a new Act, perhaps considerably modified as a result of experience in the next three months, will be necessary. As to the rehabilitation of individuals, solutions will involve laws, but will transcend the limitations of law.[10]

A concluding word of praise must be allotted to the forms issued to the public on matters arising out of the Act. The contrast between the former V.O.W. 1 form, which enjoined the battered householder to declare, if he held "in freehold or feu," whether he was "subject to any fixed charges, e.g. Chief Rent, Fee Farm Rent, Feu-duty, Ground Annual, Land Tax, Tithe Redemption Annuity, etc.," and the clearly worded memoranda and boldly printed and understandable forms issued under the War Damage Act, shows refreshing common sense on the part of somebody.

MORRIS FINER.

[10] The Landlord and Tenant (War Damage) (Amendment) Bill, now being considered, goes some way towards improving the position of weekly tenants who have suffered war damage, a class that receives little consideration under the War Damage Act.

NOTES OF CASES

Diplomatic Immunity

Since the Diplomatic Privileges Act, 1708, English Courts have in a number of leading cases increasingly clarified this branch of international law, and to elaborate the principles which can be regarded as clearly established, is perhaps justified.

First, the limitation of diplomatic immunity under Queen Anne's Statute to the ambassador "or the Domestick or Domestick Servant of any such Ambassador, or other publick Minister" is not to be understood in any exclusive sense: "The Statute of Ann. is only explanatory of the law of nations; and the words 'domestic' and 'domestic servant' are only put by way of example" (*Hopkins* v. *de Robeck*, 3 T.R. 79, at p. 80; *Parkinson* v. *Potter*, 16 Q.B.D. 152). The Statute is merely confirmatory of the common law and of international law, but does not "define exhaustively the nature of diplomatic privilege" (*The Amazone*, A.C. 56 T.L.R. 266, at p. 268).

Second, the "great principle is to be found in Grotius, De Jure Belli ac Pacis, b. 2, c. 18, s. 9: *'Omnis coactio abesse a legato debet'*" (*The Magdalena Steam Navigation Co.* v. *Martin*, 28, Q.B.D. 310, at p. 314). As so often in the case of rules of international law which can claim general observance, the sociological explanation is to be found in the relationship of reciprocity and mutuality which provides an inherent guarantee of the observance of these principles (cf. Sir Cecil Hurst, *Diplomatic Immunities: Modern Developments*, B.Y.I.L., 1929, p. 3). In the earlier decisions, diplomatic immunity is based on the doctrine of an objective and fictitious extraterritoriality. The diplomatic agent "is not supposed even to live within the territory of the sovereign to whom he is accredited; and if he has done nothing to forfeit or to waive his privilege, he is for all judicial purposes supposed still to be in his own country" (*The Magdalena Steam Navigation Co.* v. *Martin*, 28 Q.B.D. 310, at p. 311). Gradually, however, this artificial justification of legal rules based on customary international law was replaced by the direct reference to this source of law, and it was held on those grounds that "diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction" (*Dickinson* v. *Del Solar* (1930) I K.B. 376, at p. 380; as applied to the immunity of public ships, *Chung Chi Cheung* v. *R.*, P.C.C. (1938) 4 All E.R. 794).

Third, the doctrine that diplomatic immunity covers merely civil process, but does not extend to the sphere of criminal jurisdiction, is neither endorsed by State practice nor by the authority of any English Court (Cf. an examination of doubtful cases, Sir Cecil Hurst, *Les Immunités Diplomatiques*, Hague *Recueil* X (1927), p. 169).

Fourth, the immunity of a diplomatic agent is ultimately derived from the immunity of his sovereign. It is delegated by the sovereign to his ambassador or minister and through him to those members of his mission who enjoy diplomatic immunity (*Fisher* v. *Begrez*, 2 C. & M. 240, at p. 243; *Dickinson* v. *Del Solar* (1930) I K.B. 376).

Fifth, the diplomatic privilege of the ambassador or minister extends to his subordinates "where it can be shown that it is claimed in the interests of the ambassador as necessary to the exercise of his functions and his comfort and convenience" (*Parkinson* v. *Potter*, 16 Q.B.D. 152, at

p. 155). It is not, however, sufficient that, in fact, a person is a member of the ambassadorial staff, but required that " he has been accepted and recognized by the Crown as such a member" (*Engelke* v. *Musmann* (1928) A.C. 44 T.L.R. 731, at p. 736). For this purpose, the insertion of a name into the Foreign Office list which is based on the lists of embassy staffs periodically submitted to the Foreign Office, is usually regarded as sufficient, though not as conclusive by the Courts of this country (ibid. 733; *Assurantie Compagnie Excelsior* v. *Smith*, A.C. 40 T.L.R. 106).

Sixth, the diplomatic immunity of an ambassador whose mission is terminated extends over "a reasonable time" afterwards in order to enable him "to wind up his official business" (*The Magdalena Steam Navigation Co.* v. *Martin*, 2 E. & E. 94; *Musurus Bey* v. *Gadban and others*, 10 T.L.R. 493; *In re Suarez* (1918) I Ch. 176, at p. 192).

Seventh, the privilege of diplomatic immunity can be waived in accordance with the maxim: "*Quilibet potest renunciare juri pro se introducto*" (*Suarez* v. *Suarez*, A.C. 34 T.L.R. 127). In so far as his own person is concerned, an ambassador or minister can do so only with the consent of his sovereign or minister. If he does so, it must be assumed that he has such consent (*Bolivia Exploration Syndicate* (1914) I Ch. 139). The ambassador or minister has full discretion to waive the diplomatic immunity of any of his subordinates (*Dickinson* v. *Del Solar* (1930) I K.B. 376, 380; Harvard Research 1932, I, Art. 26). A member of the diplomatic mission may not oppose a renunciation made for him by his government or by the chief of his mission (ibid.).

In the case *Rex* v. *Kent* (57 T.L.R. 307), the Court of Appeal found occasion to apply several of these principles and to establish another point which, so far, had not been settled by English Courts. Kent appealed against his conviction at the Central Criminal Court of offences under the Official Secret Acts and the Larceny Act and his sentence of seven years' penal servitude for having obtained certain documents contrary to the Official Secret Acts and by the larceny of two of these documents. The appellant was employed as code clerk in what is described in the report as the X Embassy (though the nationality of the Embassy was mentioned in the daily press), and his name had been submitted to the Foreign Office in the list of those members of the X Embassy for whom diplomatic immunity was claimed and obtained. On the day before or on the day of his dismissal of which the appellant was informed by a letter handed to him, the ambassador waived any right of diplomatic privilege in connexion with the case, and this action was confirmed by the ambassador's government.

The appellant claimed that the waiver by the X government and the ambassador of his immunity could not deprive him of his diplomatic privilege, but, in accordance with established practice, the Court of Appeal disposed of this argument (Cf. Rule Four above).

In addition, Kent claimed in his favour the application of the principles governing the termination of a diplomatic mission (Cf. Rule Six above) and he relied on a passage in Oppenheim-Lauterpacht, (vol. I, 1937, p. 636, n. I) in which, in the case of the termination of a diplomatic mission, the immunity from *civil* process is discussed. This term covers the cases of the fulfilment of the function for which a diplomat has been entrusted with a mission, death or abdication of the sovereign in case the sending State is a monarchy, revolution in the sending State as a result of which a new government is established, and the recall of the member of a mission (Harvard Research, 1, c. p. 134). These cases are,

however, essentially different from those in which an ambassador or minister waives the immunity of one of his employees or dismisses him from his service. In these instances, the privilege ceases from the moment of the waiver or dismissal. Since while it lasts, the privilege merely implies immunity from local jurisdiction and not exemption from the law of the land (Cf. Rule Two above), no question of a retroactive application of the law can arise. In the formulation of the Court of Appeal, "the cloak of the Ambassador no longer covers the individual, and the individual then becomes liable to any process of law to which ordinary people are subject."

With regard to another of the appellant's contentions that the Official Secret Acts of 1911 and 1920 do not apply to acts committed by a diplomatic agent in respect of documents of the diplomatic mission in which he is employed, the Court of Appeal held that these provisions "are capable of applying to the circumstances of this case just as much as if he had obtained a document from a Department of the Government in this country."

From the standpoint of international law, as applied by English Courts, this judgment deserves attention, because it not only confirms points of the law of diplomatic immunity established before, but also presents the first case in which a court of this country had the opportunity of establishing a clear and necessary distinction between the rules governing the termination of a diplomatic mission and those applicable in the case of the waiver of immunity on behalf of the member of the mission by his superior ambassador and of the subsequent dismissal of that diplomatic agent. G. SCHWARZENBERGER.

Domicile of Married Women

The grave defects of the English conception of domicil have again become apparent in *Re White, Mastaka* v. *Midland Bank Executor Trustee Co., Ltd., and Lauderdale,* [1941] 1 All E.R. 236. The Inheritance (Family Provisions) Act, 1937, does not apply to the estate of a deceased person unless it can be proved that the testator died with an English domicil. In *Re White* the testatrix had been married to a Russian whose domicil was unknown, and from whom she had been separated for years. Farwell, J., held that the Act did not apply since the testatrix' domicil necessarily followed that of her husband, and it was impossible to prove that his domicil was English at the time of her death. The notion that a married woman's domicil follows that of her husband is out of tune with the general trend of modern English law. The British Nationality and Status of Aliens Act, 1933, while upholding the principle that a married woman takes the nationality of her husband, removes some of the worst hardships to which it gave rise. The Law Reform (Married Women and Tortfeasors) Act, 1935, destroys the last remnants of the disabilities by which married women were affected at common law. The Matrimonial Causes Act, 1937, makes it possible for a married woman to bring a petition for separation, divorce, or a declaration of nullity if she has been deserted by her husband who was, at the time of the desertion, domiciled in this country. While thus wiping out some of the evil consequences occasioned by the present law of married women's domicil, the Act leaves untouched the rule that a married woman cannot acquire a domicil of her own. Since, however, a considerable part of Private International Law, especially in matters of capacity, marriage, and succession to movables, centres

around the concept of domicil, this rule leads to results which are quite incompatible with the spirit in which other branches of the law approach the problem of the legal status of the married woman. It is established law that not even a judicial separation from her husband restores to a married woman the capacity of choosing her own domicil (*Attorney-General for Alberta* v. *Cook*, [1926] A.C. 444), let alone a separation in fact or a desertion by the husband. The absurd consequences are apparent from the case under review.

In the United States where, of course, the domicil principle governs the Conflict of Laws, much as it does in this country, the rule is not applied with the same harshness. (See the decisions of the United States Supreme Court in *Haddock* v. *Haddock*, 201 U.S. 562, and *Williamson* v. *Osenton*, 232 U.S.619). On the Continent the conception of domicil is fundamentally different from that applied in this country and in the United States, and it is of less consequence. Yet it may be pointed out that it is generally thought to be necessary to give a married woman in certain circumstances the power of acquiring a domicil of her own. Thus, by a law of 1893, the harsh provision of Art. 108 of the French Code Civil: "*La femme mariée n'a point d'autre domicile que celui de son mari*," was mitigated by the addition: "*La femme separée de corps cesse d'avoir pour domicile légal le domicile de son mari.*" According to German law (section 10 of the Civil Code) a married woman can establish a domicil of her own, as long as her husband has no domicil or as long as he has a domicil abroad to which she is under no duty to follow him.

It is not unlikely that the law of the domicil will gain rather than lose in importance as a consequence of the present war. The "law of the nationality" is meaningless where the territorial unit covered by one system of civil law fails to coincide with the unit of national allegiance. The recent case *Re O'Keefe* 1 (1940) Ch. 124, furnishes an example of this. In fact, it is perhaps no exaggeration to say that the tide of the law of the nationality which was caused by the French Revolution and which, at one time, seemed to sweep the whole of the Continent, began to recede with the failure of the Hague Conventions. If, as a consequence of political changes after this war, whether in the direction of federal union or otherwise, the law of the domicil again extends its sway to those countries which now pay homage to the nationality principle, the uniformity of the domicil concept as applied in the various national systems of conflict of laws becomes a matter of increasing urgency. Cases like *Collier* v. *Rivat* (1841), 2 Cunt. 855, *Bremer* v. *Freeman* (1857), 10 Moore P.C. 306, and *In re Annesley*, [1926] Ch. 692, demonstrate the danger inherent in that "latent" conflict of laws which arises from a divergence of the domicil concepts used in different countries.

The English and Scottish conception of domicil has become more artificial and rigid than that of any other country of which the present writer is aware. This is partly due to the "revival" doctrine in *Udny* v. *Udny* (1869), L.R. 1 Sc. App. 441, and partly to the idea that a married woman cannot in any circumstances acquire a domicil of her own. Thus, international policy as well as modern ideas concerning the position of the married woman in society would seem to demand the abolition of the principle on which the case under review was decided. For, to quote a dictum of Holmes, J., in *Williamson* v. *Osenton*, above, its only justification lies in the "now vanishing fiction of identity of person."

O. KAHN-FREUND.

Interrelation of the Law Reform Act, 1934, and the Fatal Accidents Acts

In *Yelland* v. *Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 All E.R. 278 at 289 ff., the Court of Appeal (affirming Lewis J.) applied Lord Atkin's suggestion in *Rose* v. *Ford*, [1937] A.C. at 835, for avoiding duplication of damages under the Law Reform Act, 1934, and the Fatal Accidents Acts, 1846 to 1908. Lord Atkin's suggestion was that "if those who benefit under the last-mentioned Acts also benefit under the will or intestacy of the deceased personally their damages under those Acts will be affected." The reason lies in the well-established rule that in assessing damages under the Fatal Accidents Acts allowance has to be made for any benefits received by the dependant under the will or on the intestacy of the deceased. Statutory exceptions are made to this rule by the Fatal Accidents (Damages) Act, 1908, and the Widows', Orphans' and Old Age Contributory Pensions Act, 1929, s. 22, whereby insurance moneys and widows' and orphans' pensions payable under an Act of 1925 are to be left out of account. It was contended in the instant case that a further exception is established by section 1 (5) of the Law Reform Act, which declares that "the rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908 . . . " The argument was that this had the effect of excluding from consideration the damages awarded under the Law Reform Act in assessing the damages under the Fatal Accidents Acts. The contention was rejected, du Parcq, L.J., observing that "the only effect of the subsection, in my opinion, is to make it clear that, whatever pecuniary advantage may result to a dependant through the Law Reform Act, he remains entitled to damages under the Fatal Accidents Act if he is still in a position to prove a balance of pecuniary loss." The Court accordingly approved the earlier decision of Singleton, J., in *Feay* v. *Barnwell*, [1938] 1 All E.R. 31 (see note, (1938) 2 Mod. L. Rev. 62).

One small slip seems to have been made by Lewis, J., in the Court below, which was not corrected in the Court of Appeal. Lewis, J., assumed that the whole of the sum awarded under the Law Reform Act would accrue to the benefit of the widow on the intestacy of the deceased (the estate being less than £1,000). But as Singleton, J., pointed out in *Feay* v. *Barnwell*, the whole of this sum would not in fact reach the widow's pocket, for there would be some administration expenses and death duty to be paid. Hence the proper course is not to deduct the whole of the damages under the Law Reform Act from those under the Fatal Accidents Acts, but to deduct only such damages less administration expenses and deathduty.

The fact that the damages under the Law Reform Act have to bear death duty, while those under the Fatal Accidents Acts do not, will be borne in mind by the astute practitioner in effecting a settlement out of Court. Where a claim like that in the present case is settled for a lump sum, the plaintiff's adviser should have the presence of mind to allocate the damages so far as possible to the claim under the Fatal Accidents Acts, for they will not then bear death duty. To the defendant the question is one of indifference, save that he should insist upon some small part of the sum being allocated to the claim under the Law Reform Act, for otherwise that claim will remain open.[1]

[1] Where the settlement takes place as a result of the defendant paying money into Court, which is taken out by the plaintiff as sufficient, the allocation of course rests with the defendant.

There are some persons to whom, as Emerson remarked, a law is what a fence is to a nimble schoolboy—a temptation for a jump. Such people will observe that the reduction of damages in accordance with Lord Atkin's dictum takes effect only if those who benefit under the Fatal Accidents Acts also benefit under the will or on the intestacy of the deceased. "If they do not," said Lord Atkin, "there seems no reason why an increase to the deceased's estate in which they take no share should affect the measure of damages to which they are entitled [under the Fatal Accidents Acts]." Accordingly a person who is brought to his deathbed as the result of another's negligence, in such circumstances that his dependants will have a claim under the Fatal Accidents Acts approximately equal to the share that they would normally take in his estate (taking into account the damages that will probably be recovered under the Law Reform Act) may decide to make or alter his will so as to exclude these particular relatives (or some of them) from benefit in respect of his estate. Indeed it should not be beyond the wits of the draftsman of a will to provide for the contingency in advance, so that the dispositions in favour of the members of the testator's immediate family are contingent on their not becoming entitled to an approximately equal amount as a result of the Fatal Accidents Acts. In this connection it may be pointed out that for the purpose of the Fatal Accidents Acts each dependant is dealt with separately—i.e., where one dependant is impoverished by the death it is not regarded as a defence to his claim to show that the dependants as a body are no worse off by the death. Hence by switching over the whole estate to a single dependant, this dependant will be able to pocket the damages under the Law Reform Act, while the rights of the other dependants under the Fatal Accidents Acts will be preserved in full.

Where this precaution has not been taken another way of evading the decision in the instant case may suggest itself to a not-too-scrupulous plaintiff. He may try to launch his[2] claim under the Fatal Accidents Acts first, and when he has recovered in full under those Acts, proceed with his action under the Law Reform Act. This move could easily be countered by the Court in the first action, for it is submitted that this Court would be justified in making a provisional assessment of the damages under the Law Reform Act to which the plaintiff would be entitled, for the purpose of deducting them from the sum awarded under the Fatal Accidents Acts. But suppose that the trick is not spotted by the judge in the first action; or suppose that the claim under the Fatal Accidents Acts is settled out of Court, nothing being said as to the claim under the Law Reform Act. Will the defendant then have any defence when the second action is brought? It may be suggested that justice can still be done within the limits of Lord Atkin's principle by allowing the second action only on the terms of the award or settlement in the first action being reopened. Cf. *Ellis* v. *Raine*, [1939] 2 K.B. 180.

There is, however, another possible avenue of approach to this type of problem, namely, the one adopted by Lord Wright in *Rose* v. *Ford*, [1937] A.C. at 852. When assessing damages for loss of expectation of life under the Law Reform Act, Lord Wright said, "I think the jury would be properly directed to take into account either that they were at the same time giving damages under Lord Campbell's Act as they did here

[2] For the sake of brevity of statement it is supposed that the dependant is also the personal representative of the deceased.

or that such damages had been or might be given. . . . One of the fruits of continued life is generally provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced." This method of dealing with the duplication of damages was adopted by Branson, J., in *May* v. *McAlpine & Sons, Ltd.*, [1938] 3 All E.R. 85, 54 T.L.R. 850, and by Langton, J., in *The Aizkarai Mendi*, [1938] P. 263, in the special circumstances then before each judge. With deference it is submitted, however, that Lord Atkin's rule, within its own scope (i.e., when the dependants also benefit from the estate) is more efficacious in preventing duplication of damages than Lord Wright's, and ought to be accepted in preference to it.[3] All that Lord Wright's rule does is to scale down the damages awarded for loss of expectation of life. It was framed at a time when it was contemplated that such damages might (but for the rule) be on an extensive scale; and now that the Courts are prepared to be more niggling in their awards under this head (*Benham* v. *Gambling*, [1941] A.C.), the scope for applying Lord Wright's rule is correspondingly reduced.

The importance of the rule is, however, that it suggests a way of meeting a case that Lord Atkin's rule leaves unprovided for. This is where a person dies leaving dependants who come within the protection of the Fatal Accidents Acts, but bequeathing all his property to a third person. Where the dependants get compensation under the Fatal Accidents Acts, Lord Wright's dictum can be used to reduce the money going into the pockets of the legatee. Suppose, for instance, that two friends, A and B, in identical stations of life and states of health, are fatally injured in a car mishap through the negligence of the defendant. Suppose that A was accustomed to maintain his widowed mother and B was accustomed to maintain his invalid sister. And suppose that A, following the suggestion advanced in the earlier part of this note, makes a will on his death-bed leaving all his property to his brother. Then, if it were not for Lord Wright's rule, A's survivors would together get cumulative damages under the Law Reform Act and the Fatal Accidents Act (for the mother comes within the latter Acts), while B's family would get only damages under the Law Reform Act (for a sister does not come within the Fatal Accidents Acts). In such circumstances, Lord Wright's rule can be used to authorise the award of a relatively larger sum in respect of B's expectation of life than in respect of A's expectation of life, thus tending to equalise matters as between the survivors of A and the survivors of B.[4]

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[3] Against Lord Atkin's rule two objections have been urged (see Goodhart in (1938) 54 L.Q.R. 3, and Seaborne Davies in (1932) 2 Mod. L. Rev. 64, Annual Survey of English Law (1937) p. 171 and (1938) p. 184). (1) If it turns out that the estate of the deceased is insolvent, the dependants may suffer. (2) The defendant has to pay more than if Lord Wright's rule is applied, because a part of what he pays goes in death duty. But as to (1), the danger arises not so much from Lord Atkin's rule as from a possible clumsy administration of it. All that the rule says is that to the extent to which the dependants actually benefit under the estate the award under the Fatal Accidents Acts must be cut down. As a practical matter, it ought not to be difficult to postpone the final settlement of damages until the solvency of the estate is ascertained.

[4] Lord Wright's rule seems to have been ignored by du Parcq, L.J., in the instant case when he said (at p. 294) that "the rights of the legal personal representative under the Law Reform Act cannot possibly be affected by anything awarded to dependants under the Fatal Accidents Acts."

Negligence and Contributory Negligence—Collision during Black-out

No new principle is involved in *Franklin* v. *Bristol Tramways and Carriage Co., Ltd.*, [1941] 1 All E.R. 188, but it is a useful application of ordinary principles of negligence and contributory negligence to black-out conditions. The Court of Appeal held, in the first place, that it was negligent to drive a bus without the masked headlight that was permissible and with sidelights so high that they did not serve to illumine the road. Observe that it was not held that the absence of a headlight would in itself have damned the defendants, if the sidelights had been properly placed. In the second place it was common-law contributory negligence in the deceased, who had been run into from behind by the bus, while walking with a bicycle that did not carry the statutory rear-light, to fail to look round and to step off the road when the bus approached. This was independent of the breach of statutory duty in failing to carry a rear-light. The net result was that the action in respect of the deceased's death failed, contributory negligence being a defence.

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Hire-Purchase Agreements and the Courts Emergency Powers Act, 1939

Bowmaker, Ltd. v. *Tabor* (1941), 2 All E. Rep. 72, is as interesting a study in retributive ethics as in law. By s. 1 (2) of the Courts Emergency Powers Act, 1939, goods let on hire purchase cannot be retaken by the owner without leave of the Court. The plaintiffs invented a scheme for getting over this difficulty, but it was foiled by the Court; the attempt not only failed but involved them in the payment of damages.

The defendant Tabor had acquired, before the war started, a car from the plaintiffs on hire purchase terms. He had already by March, 1940, paid £268 out of £443, and was then £64 in arrears. In these circumstances he was visited by the owner's agent, who invited him to return the car if he could not complete payment for it, and upon his agreeing at once produced a form of application to be allowed to surrender it, which the defendant signed. No application was ever made to the Court for leave to retake the property, but the defendant in fact surrendered the car, and was promptly rewarded by a county court summons for the arrears then owing. The plaintiffs had been a little bit too grasping, however, for the defendant counterclaimed damages for breach of statutory duty: if they had been content with the car they might have succeeded in their design.

In the view of Goddard, L.J., the form which the defendant signed had been "drafted for the express purpose of endeavouring to avoid the necessity of applying to the Court"; if it had achieved that object there would have been a "loophole of which not only hire purchase dealers, but also others to whom the various remedies of self-help dealt with in s. 1 (2) would not be slow to take advantage." It failed of that effect, however, for the Courts (Emergency Powers) Act, 1939, is careful not to place the onus of applying for relief upon the debtor, but "just because debtors may be ignorant of the provisions of the Act the legislature has enacted that the creditor must get leave to proceed, and has not put on the debtor the burden to restrain him."

It had already been held by Farwell, J., in *Soho Square Syndicate, Ltd.*

v. *Pollard (E.) & Co., Ltd.* [1940], Ch. 638, that the parties to a contract covered by the statute cannot contract out of it, and in the instant case the Court of Appeal held that the same principle applies to waiver of rights under the Act. In the result therefor the surrender of the car was ineffective, and the plaintiffs' action in retaking possession was a breach of statutory duty for which they must pay damages.

The plaintiffs made a final struggle to avoid liability on the basis of *volenti non fit injuria*, but this argument received short shrift, being dealt with on the basis of the well-known principle of *Thomas* v. *Quartermaine* (1887), 18 Q.B.D., 685, where it was held that the maxim does not apply where there has been a disregard of an obligation imposed by statute.

R. S. T. C.

Fire Insurance—Insured Property inadvertently Set on Fire

A decision which at first sight appears absurd but which on consideration is found to be logical, if not inevitable, is that in *Harris* v. *Poland* (1941), 1 All E. Rep. 204. The plaintiff had insured the contents of her flat against (*inter alia*) fire. One day, as she was leaving the flat unoccupied, she concealed her jewellery in the firegrate among the sticks and paper laid for the lighting of a fire. Returning late in the day she forgot what she had done and lighted the fire, which consumed most of the jewellery.

She proceeded, it might be thought, with some hardihood, to make a claim under the policy. The insurer resisted—not on any ground of negligence, or that the insured had herself caused the loss—but because in his view the policy was only intended to cover loss by fire occurring in some place where no fire was intended to be. Atkinson, J., refused to accept this view of the matter, holding that no such limitation as that contended for by the insurer could be read into the policy. In his view loss by fire in a fire policy means loss occurring accidentally and through the actual ignition of the insured property. If goods had been blown or knocked into the fire he thought it was plain that the loss would have been covered, and deciding the case within the limits of the defendant's contentions, he could see no difference between that type of case, and the type where the property was inadvertently placed in the fire.

It is curious that apart from some *dicta* which were plainly not directed to any set of facts resembling those under discussion, there was no authority to assist the learned judge, except a well-argued discussion in Welford and Otter Barry on Fire Insurance. The generally accepted view is that a textbook is no authority until its author is dead, and one is glad to know that Atkinson, J., is prepared (as are in our experience most judges of his generation) to disregard this shibboleth and to give attention to the opinion of such an authority as Mr. Baker Welford on such a point as this, since everyone who has had to consider the law of fire insurance during recent years is well aware of the great value of his work.

It is perhaps to be regretted that the insurers did not take the other points which were open to them. In regard to the first of these, viz. that the loss was occasioned by the negligence of the insured, the authorities seem fairly conclusive that this is no defence. The defendant might perhaps have been on stronger ground with an argument that the insured caused her own loss by setting fire to her own property. This defence however introduces an element of intention, and even so is difficult to

disentangle from the defence of negligence. Suppose a man throws his gold cigarette case to a friend who fails to catch it, and it goes into the fire, can it be said that the loss is not covered? The ignition is here accidental and not deliberate. If a domestic clearing away some rubbish, as she supposes, puts into the fire a valuable article, the burning is in a sense deliberate. As *Trim* v. *Kelly* (1914), A.C. 667, shows, however, a deliberate act, such as murder, may be an accident from a legal point of view, and it is not considered that the fact that the domestic intended to burn what she placed in the fire can make any difference. Does it matter that it was the insured himself who inadvertently placed the article in the fire? It is not easy to see how in principle that can make any difference. The direct cause of the loss was the fire, and if it is immaterial (as it is) that the fire was enabled to operate owing to the negligence of the insured then the loss appears to be covered by the terms of the policy.

R. S. T. CHORLEY.

The Meaning of "Factory"

The point of particular interest in *Wood* v. *L.C.C.* (1941), 57 T.L.R. 499, is the definition of a factory as given in the Factories Act, 1937. The plaintiff, a kitchenmaid, brought an action for damages against the London County Council. Her right hand had been severely injured by an electrically-operated mincing machine, in the kitchen of an L.C.C. Mental Hospital, causing her permanent disablement.

She alleged that the kitchen was a factory within s. 151 (1) of the Factories Act, 1937, and that the L.C.C. through their servants had been guilty of a breach of their statutory duty in neglecting to fence the machinery, as required by s. 14 of the same Act. The L.C.C. denied negligence and pleaded contributory negligence on the part of the plaintiff.

S. 151 of the Factories Act defines a factory as "any premises in which . . . persons are employed in manual labour in any process for or incidental to any of the following purposes, namely—

(*a*) the making of any article or of part of any article, or

(*b*) the altering . . . of any article, or

(*c*) the adapting for sale of any article."

S.s. 9 further states that "any premises belonging or in the occupation of the Crown or any municipal or other public authority shall not be deemed not to be a factory . . . by reason only that the work carried on thereat is not carried on by way of trade or for purposes of gain."

In the first Court it was held that in this case the kitchen was a factory, and that the mincing of corn beef in a mincer constituted the "alteration of an article" within the meaning of s. 151 (1), and it was further held that the defendants had been guilty of negligence through not fulfilling their statutory duty to fence the machine. The plaintiff failed in her claim, however, as the judge held that she had been guilty of contributory negligence.

On appeal, the Court of Appeal agreed that the accident had been due to the contributory negligence of the plaintiff, but disagreed with the Court below in their finding that the kitchen constituted a factory within s. 151 (1) of the Factories Act, 1937. As Mr. Justice MacKinnon put it, extraordinary results would follow if a kitchen were held to be a factory,

as it would be necessary to limit hours, exhibit notices and fulfil many other requirements which in his view would be quite unsuitable and unnecessary for premises of this kind. He considered that even if the kitchen had been one belonging to a restaurant carried on for purposes of gain it would not have been a factory. The question as to whether the machine had been securely fenced did not therefore arise.

It would seem that if premises of this character are outside the safety requirements of the Factories Act, even though machinery which may be dangerous and which would be required to be fenced in a factory is used, the workers are in a rather unsatisfactory position. They cannot plead breach of a statutory duty in an action for damages, and must therefore either claim the much smaller compensation awarded under the Workmen's Compensation Acts or prove negligence by the employer—a very difficult proceeding.

Weston v. *L.C.C.* (1933), 57 T.L.R. 390, is another case which deals with the definition of a factory for the purposes of the Factories Act, 1937.

The plaintiff was an experienced woodworker, who, wishing to become familiar with new machinery, attended the Hackney L.C.C. Technical Institute—an Institution intended for the instruction of adults.

After two lessons on a particular machine, the instructor, having shown the plaintiff how to assemble the cutters correctly, left him to make the necessary adjustments. The instructor remained within call, expecting the plaintiff to call him back before turning on the power and beginning to work. The plaintiff, however, began to work the machine on his own and in a dangerous and incorrect manner, resulting in a serious injury to his hand. He claimed damages alleging that the machine had not been fenced as required by the Factories Act, and that the defendants had failed to give him adequate instruction or supervision.

Mr. Justice Wrottesley in his judgment referred to s. 151 of the Factories Act, and stated that neither sub-s. (1) para. (x) or sub-s. 9, which it was argued for the plaintiff, covered a Technical Institute, could be said to apply. No trade or purpose of gain was involved so that sub-s. (1) could not apply; and while sub-s. (9) was designed to cover certain undertakings owned by public or local authorities—and he instanced *Wood* v. *L.C.C.* as an instance which clearly fell within the Act—a school or college was not such an undertaking. Other sections of the Act showed clearly that Parliament did not intend in this Act to legislate for schools or colleges, and the words "people who are employed" in sub-s. (1) cannot be said to cover pupils or scholars "occupied" or "engaged in work," but employees in the usual sense of the word. The judge further found that the L.C.C. had not been negligent in omitting to give adequate instruction or supervision, and that the accident was really caused by the plaintiff's doing what he had, while working on another machine, been told not to do.

This decision does not give rise to the doubts which might be caused by *Wood* v. *L.C.C.* It is unlikely that the protection afforded by the Factories Act will be necessary in Technical Institutes where adequate supervision and instruction are provided, and where the students are adult and possibly experienced workers. The position is different where, as in *Wood's Case*, the workers may be using possibly dangerous machinery without supervision.

R. C. CHAMBERS.

REVIEWS

WAR AND CRIME. By HERMANN MANNHEIM. London, Watts & Co., 1941. pp. ix, 208. **18s.**

Dr. Mannheim is a distinguished refugee lawyer, and now lecturer in Criminology at the London School of Economics. By his former publications in English, *The Dilemma of Penal Reform* and *Social Aspects of Crime in England*, he has given considerable impetus to the study of crime and punishment in this country. In his new book he shows that by war two trains of thought are set in motion in the criminologist. The one is concerned with the influence of war upon crime. It is scientific, mainly technical and analyses the data of social statistics; the second is mainly philosophical, and tries to derive enlightenment and help from the application of the notions of crime and punishment upon war itself.

The book is based on a course of lectures delivered during February and March, 1940. Though it has been expanded to include the material published during the first half of 1940, including the Report of the Commissioner of the Metropolitan Police for 1939 and a careful study of the daily press, it can naturally not yet arrive at a detailed account of the influence of the present war on the crime situation.

It gives, however, a very clear forecast of what we have to expect from the impact of war on lawlessness and what we shall have to cope with under conditions of total warfare.

The main lessons of this part are derived from a consideration of the world war, 1914–1918, and other wars preceding it; most interesting of these is a discussion of the difficulties to arrive at the real facts of the situation, because of our ambiguous conceptions of crime and the pitfalls of the usual statistics.

The notion of crime covers different acts forbidden by different societies, and under the influence of war crimes against property, sexual crimes or crimes of violence may move in entirely different directions. For the criminologist, to whom the question of individual, i.e. biological and psychological factors versus external, mostly economic and social factors in the causation of crime is ever present, war is but a tremendous experiment, a change of environment which allows him to study its influence on crime.

Contrary to expectations, crimes against property tend to diminish at least in the first part of a war. War is a negative process of selection, as the fittest and strongest go into battle leaving the weak and inferior behind. These latter, who previously could only with great difficulty find an opportunity of making use of their labour, and were consequently always falling into crime of different kinds, now suddenly find themselves in great demand, as they, being morally or physically disqualified from active service, are the only working hands to be found. Their economic position improves, they are put in the way of satisfying many of their needs without resorting to crime and, consequently, the number of crimes committed falls abruptly. If one considers further that those who have joined the armed forces either have no opportunity of breaking the law, or at least, as they are subject to martial law, not in such a way as to appear in statistics, criminality must show a marked decrease.

On the other hand deteriorating economic conditions, scarcity of food, clothing and luxuries, may cause a passionate and feverish desire which

unable to be satisfied legally because of rationing may strengthen abnormally the psychological impulses to crime among certain classes, e.g. juveniles, and cancel the favourable effects discussed. Dr. Mannheim manages well to compress a discussion of practically the whole literature and all the relevant facts that are available into these chapters, and already many traits foretold by him from his study become discernible more clearly. It is comforting to learn from him that the efforts of a generation of criminologists have led to much improved methods of meeting the ensuing dangers especially in the field of fighting juvenile delinquency by the juvenile courts, the probation service, the Child Guidance Clinics and the Approved Schools and the Borstal system, although efficient use of these facilities may be prevented by unforeseen difficulties arising in the course of the war.

The philosophical part of the book tends to revive the age-old efforts to apply the conceptions of right and wrong to war. Under this aspect an unjust war is a crime, a just war becomes punishment, and many interesting analogies are derived from the teachings of criminology by comparing the causes and prevention of crime with the causes of war and the possibilities of its prevention.

The author deplores that International Law does not accept the distinction between just and unjust wars instead of confining itself to its present working out of rules applicable to warfare without any regard to the justness of a particular war, thus abandoning its proper calling. Like Leonard Nelson in his famous outcry against the *Rechtswissenschaft ohne Recht* in the middle of the last war, he wants to build international law on a firm foundation of right and wrong, and protests against those lawyers who working out in immense detail technical rules busy themselves with less personal risk and more profit than by attempting to solve the real problem of war.

The difficulties of this concept, however, although recognised by the author, may be even greater than he thinks. For the ideas of crime and punishment, though connected with our ideas of right and wrong, derive their force in social life not so much from morals as from the authorities that pronounce and enforce them. And while such authorities are firmly established in the case of criminal law, not much of it can be discovered in international law so far, and, if in consequence of this war such an authority came to establish itself, its laws might be very different from what Dr. Mannheim would wish them to be. This, however, only enhances the value of the interesting and always stimulating suggestions of the author as a basis for further discussion.

G. Rusche.

A FEDERATION FOR WESTERN EUROPE. By W. Ivor Jennings. Cambridge University Press, 1940. vi + 196 pp. **3s. 6d.**

The deceptive lull during the first months of the war provided a semi-peaceful background for the drafting of manifold schemes for an international post-war order. To-day, when attention is concentrated on the main effort of winning the war, one is inclined to forget the unreal atmosphere in which this inflation of drafts, committed to patient paper, took place, and to be unnecessarily harsh with plans which seem concerned with a still very remote future. This stage of enthusiasm which is unavoidably connected with the finding and mapping out of an apparently newly

discovered *terra incognita*, has now fortunately passed. The host of schemes lies scattered about, and nobody seems to take them too seriously any longer. Though it is admittedly a highly tiring task to have to read a dozen of them (much more difficult than to enrich the world by an additional plan), the labour is justified by the result. For in the end, all these schemes fit into a few patterns which they elaborate and repeat with more or less originality, ingenuity and knowledge of past attempts and failures. These plans seem invariably to conform with one of four patterns or a combination of some of them. The author may belong to the school of the Versailles or other "realist" patterns, meaning that he fundamentally believes in, or wants to see established at the end of the war, another system of power politics with or without the disguise offered by a revived League of Nations, or he may prefer to supplement the rule of force by limited attempts at economic or "intellectual" co-operation. He might represent the League Reform pattern, hoping to overcome the shortcomings of the failure of the post-1919 collective system by institutions such as an International Equity Tribunal or an International Police Force, without concerning himself with the implied and concomitant issue of international government. Or he might be attracted by a pattern which is so old that it appears brand-new, the Rights of Man pattern. Or finally, he may make bold and attempt to leap from international anarchy into supra-national order by federal union, either on a universal or regional scale.

Dr. Jennings's scheme definitely belongs to category IV, or to be exact, to category IV*b*. Nevertheless it would be rash to assume that his specific region could easily be defined. "Western Europe" sounds clear enough, before you read Dr. Jennings's book. Afterwards you find that countries which are very much situated in Western Europe, like Spain and Portugal, are excluded on the very sound, though not geographical argument that federation can only work between constitutionally homogeneous—and in the case of a federation based on the consent of the governed, only between democratic—countries. While from this point of view, Czechoslovakia might have a much better claim for inclusion than Germany, that valiant country is apparently not excluded on the grounds that it belongs to Central Europe, but because Dr. Jennings wonders whether "the Czechs, the Slovaks, and the Ruthenians will decide to form a single State" (p. 23). While Dr. Jennings is equally strict with the Poles in spite of their President's assurance that they intend to constitute themselves into a really democratic State after this war, Finland is included as the furthest Eastern (or North Eastern) outpost of this federation of "Western Europe." Not only are specifically enumerated Dominions of the British Commonwealth and an aspirant to this status (Southern Rhodesia) included, but the member States may also bring their dependencies into the federation and, at their choice, administer them under the control of a federal colonial commission or transfer them to the federation, subject to the latter's consent. Even India and Burma are not entirely excluded, though to Dr. Jennings "it is evident that neither could be brought into the Federation on the same basis as the European nations" (p. 43). The learned author "should be inclined to equate India with Canada and Burma with New Zealand for purposes of representation" (p. 44), i.e. a population of 350 millions with 12 millions. While at this point Professor Keith despairs and declares: "It is impossible to take this seriously" [*The New Commonwealth Quarterly*, 1940 (Vol. VI), p. 12], we should at least suggest

this point be referred back to the Drafting Committee for its serious reconsideration. Dr. Jennings contends that only a small minority of that country "have attained Western standards of education" (p. 43). Though this cannot be denied, it appears that both the sections which support the Allied war effort and those which follow the lead of Congress, very favourably compare in their standards of political ethics with the leaders of Germany and large followings in the German people whom Dr. Jennings would include as a matter of course and on the highly prejudged assumption that post-war Germany will be "a democratic Germany" (p. 25). On the surface of it, one of his other arguments appears more convincing: "Their population is 75 per cent larger than the combined populations of Western Europe and therefore they could, if given vote for vote, swamp the European votes" (p. 43). Actually, this statement covers the complicated problem of fair international representation which has so far been only very insufficiently tackled and which has arisen, though not been solved, repeatedly in the League of Nations over China. There is much to be said for it to consider a maximum of representation, just as a minimum representation of small States is taken for granted in federal constitutions. Yet it seems incompatible with the democratic structure of this blue print to attempt a solution based on discrimination against one specific country, not to speak of the unfortunate psychological effects which such a proposal necessarily must have on countries in the stage of national fermentation as present-day India.

Limitation of space forbids our dealing with the many other thorny issues raised in this scheme (the relations between the British Commonwealth and the federation, the federation and the League of Nations, the economic powers of the federation or the author's attitude towards a Declaration of the Rights of Man). Suffice it to say that to those opponents of the federal idea who maintain that the drafting of a constitution of this kind would present unsurmountable technical obstacles, Dr. Jennings has provided a conclusive answer, and, by this book, the author has certainly established a claim to be consulted as an expert draftsman by the makers of the coming peace, if—they should want to adopt a federal constitution.

G. SCHWARZENBERGER.

LE RÈGLEMENT CONVENTIONNEL DES CONSÉQUENCES DE REMANIEMENTS TERRITORIAUX. By G. KAECKENBEECK, D.C.L. Editions Polygraphiques. S. A. Zurich.

This little book is an examination of some methods of regulating the consequences of transfers of territory in the international sphere, based on the experience gained in Upper Silesia after the last war. The author outlines briefly the technique adopted in Upper Silesia in dealing with four distinct, though inter-related problems, namely, change of nationality, protection of minorities, protection of acquired rights, and, last but not least, interpretation of the treaty governing the ceded territory and its inhabitants. In each case, he assesses the value of the methods used by reference to the results obtained, and then proceeds to offer concrete suggestions for the solution of similar problems in the future.

It has, naturally, not been possible for the learned author, in so short a book, to examine thoroughly all the aspects of every question, or to give many examples or illustrations from his own rich experience as President

of the Upper Silesian Arbitral Tribunal established by the Geneva Convention of 1922. This material can be found in his book *The International Experiment of Upper Silesia*. His aim is rather to make practical suggestions of a general nature, and this brochure is consequently as interesting to the layman as to the international lawyer.

In regulating the consequences of the transfer of territory, M. Kaeckenbeeck emphasises the need for an international tribunal having authority to interpret the treaty governing the cession and to enforce the rights acquired thereunder. The judgments of this tribunal should bind the courts and the administrations of the countries concerned. Moreover, he considers that individuals should have direct access to the tribunal so established, thus breaking away from the general rule that only states are subjects of international law and therefore only states may appear before international courts. As he points out, if the grievances of individuals are conclusively settled by judicial procedure, the causes of friction between the two interested states are sensibly diminished. He also lays great stress on the value of a neutral president for the proposed court, not merely for securing impartiality and continuity of jurisprudence, but also because the moral effect of the judgments is greatly enhanced by the presence of an obviously unbiased judge.

The book's greatest defect seems to me to lie in its partial acceptance of the League of Nations concept. Sometimes one has the impression that the author is thinking in terms of international institutions which are obsolete and which may never be revived. On the whole, however, the book is clear-sighted, practical and interesting. I recommend it to all who are interested in the structure of international society.

K. M. JAFFEE.

THE LAW OF CIVIL DEFENCE. By R. WYNNE FRAZIER. London. The Solicitors' Law Stationery Society, Ltd., 1940. cccx and 1930 pp. **£5 5s.**

An attempt has been made in this work to gather into one volume the whole of that "entirely new branch of English and Scottish law," as it is called in the Preface, which began with the Civil Defence (Air Raid Precautions) Act, 1937. The volume is divided into four "books." The first of these is mainly a sketch of the functions of the Acts of 1937 and 1939, their scope, incidence and execution. Book II sets out the text of the 1937 Act with annotations and with the Statutory Rules and Orders and Provisional Regulations concerning the Approval of Expenditure. Book III deals fully with the Civil Defence Act, 1939. The Act is divided into a number of parts each of which deals with some distinct matter, such as Public Shelters, Private Shelters and Obscuration of Lights and Camouflage. In dealing with each part of the Act the author opens with an Introduction followed by a discussion of each section of the Act and an explanation of the terms and expressions used in it. The text of each section is then set out, followed by annotations and the relevant rules, orders and regulations. Book IV is a catalogue of the War Legislation, wherein the main Acts and the Defence Regulations are set out fully and annotated. The volume includes Tables of Statutes, Rules, Defence Regulations and Cases, an Addendum which brings the Book up to the date July 20th, 1940, Appendices, including a useful list of all the official

A.R.P. publications covering the practical side of A.R.P., and last but not least a good Index.

The book is not an unwieldy volume, as the number of pages might suggest, and it is well printed. As a reference book it should prove of real value to public servants, particularly those who are immersed in problems of Local Government. One of its great merits lies in the cross-references which are excellent. We have had occasion to make use of it in solving practical problems and it has emerged triumphant from this most searching of tests. Mr. Frazier is to be congratulated.

There has as yet been little opportunity for the Courts to throw light on numerous points of doubt and difficulty, as the author points out, but he has pluckily attempted to clear up many ambiguities caused by hasty draughtsmanship. The spate of legislation arising out of the War which has continued since this book was written has further complicated the Law of Civil Defence but one must embark somewhere and here at least is *terra firma*.

G. L. HAGGEN.

PRINCIPLES OF COMPANY LAW. Third Edition. By J. CHARLESWORTH, LL.D. Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd., 1940. xxxii and 328 pp. **7s. 6d.**

A second edition of this excellent textbook was published in 1938, but recent legislation such as the Prevention of Frauds (Investments) Act, and a number of important new decisions are ample justification for the publication of this third edition. The book retains the merits which have made it deservedly popular with teachers and students. It is well written and avoids the pitfalls of laying undue emphasis on details which are of no importance to the student. The present reviewer has recommended it to law students as well as to candidates for the B.Com. and B.Sc. (Econ.). The author was well advised in including a chapter on Statutory Companies, a subject of great importance which is somewhat inaccessible to the ordinary student, and he would add to the value of the book, especially from the point of view of the commerce student, if, in future editions, he could add a short chapter on Public Utilities.

O. KAHN-FREUND.